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**ADR AT THE INTERNATIONAL OIL & GAS INDUSTRY,  
THE PEMEX CASE.**  
*(A legal and socio-legal analysis)*

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**A TI,**  
**que me has permitido terminar**  
**una etapa más de mi vida,**  
**con salud y rodeado de mi gente.**

**A USTEDES,**  
**que me dieron la vida,**  
**han sido mi mayor ejemplo y sobretodo,**  
**extraordinarios guías y compañeros en**  
**esta aventura llamada “vida”**

**Luigi, grazie mille per il tuo aiuto e assistenza.**

**Emilio, muchas gracias por tu guía y consejos.**

**“Just do it...!”.... :>**

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# **CHAPTER I**

## **Research Project - Methodology.**

*“If I knew what I’m doing,  
I would not call it research, would I?”  
Albert Einstein*

### **1.1 Justification of the Research (Statement of the Problem).**

In order to make clear the problem that this research is dealing with, a brief introduction of the two subject matters which form the object of this work is below mentioned. These subject matters are: the petroleum industry, also known as Oil & Gas industry, and the Alternative Dispute Resolution Methods, well known for its acronym “ADR”.

Ever since humans inhabit this planet, they have had the necessity to produce energy to satisfy their needs. These needs have been changing in the same way as the human being interrelates with others acting as a social being. At first, they tried to satisfy individual survival needs and little by little they focused on satisfying social needs. The energy production has been evolved jointly to the development of mankind. Since the transformation into heat from the simple friction of a pair of stones, until arriving at the present methods that take advantage of high technology and deal to be more responsible with the atmosphere and the own society. The sources that humans have used to produce energy have varied, going from those easily accessible that are located in a hand distance for humans, such as water and sun, until those that are linked to the use of specialized machinery, it means that have not been readily accessible and require of great technology for their location and obtaining, as it is the case of petroleum, also known as Oil & Gas.

The sources have been catalogued into renewable and non-renewable, and a present tendency exists on the search and rational use of the former in order to obtain the substitution of the latter. However, the process is slow and we must recognize that the non-renewable sources, namely Oil & Gas, have been and will continue being the fundamental primary source in the production of the world-wide energy during the next decades.

As consequence of still being the main production source, petroleum which has been given the denomination of “black gold”, has demonstrated to be as good as valuable as any precious metal and any precious stone. The difference could be that the black gold has marked the destiny of countries, governors and their citizens, since it has been used for the development and well-being of towns and is not only an element of power and wealth like most of the precious metals and stones. In other words, the development and the economic growth of all the countries of the orb essentially depend on the availability of energy. Therefore, a crisis of the power resources will always take to a crisis of economic nature.

Like all industry, the Oil & Gas industry has had an evolutionary cycle throughout the development of mankind. With the initiation of its commercial operation in the decade of 1860, the Oil & Gas industry has operated outside the ranks of an ordinary market and the commercial transactions of their products. In multiple occasions, it has triggered serious conflicts, that go from simple controversies or contractual differences of strictly commercial nature, until confrontations or even wars that have transcended hitting not only the human life, but also the political, economic and social scopes of the nations.

The Oil & Gas industry has matured and this process has required the intervention of diverse related sciences, some of strictly technical nature and others of social nature. Out of these, we emphasize the legal science and the sociology of law. As a result of this close relationship between the Oil & Gas industry and diverse social sciences, one can mention, without a doubt, the creation of OPEC<sup>1</sup> in the year of 1960, as well as the sprouting of diverse legal orderings, both national and international, that have had the aim to establish the rules of the game in a market where the unique and main product is petroleum and its derivatives.

This organization, OPEC, has not overlooked the presence of the conflicts arisen from the Oil & Gas industry. This kind of conflicts, due to the importance of petroleum and its commercialization as the object of the disputes, as well as the economic, political and social consequences that this carries out, deserve special attention.

On the other hand, the legal science, which beginning practically goes back at the same time as the human being began to socialize, has evolved in the same way and has created alternative mechanisms of dispute settlement to the traditional method, it means, the administration of justice by national courts. These mechanisms, well known as ADR, have been applied in diverse industries, and far from the fact that the Oil & Gas industry is the exception, it is an industry that, due to the importance of its impact in society, has been an important player in this ADR game. The evolution of ADR agrees somehow with the evolution of the Oil & Gas industry. The twentieth century was a witness of the creation of arbitral centers in charge of the administration of arbitral procedures, of the creation of national legislations and international treaties that would allow their good operation, as well as of a change in the legal culture of lawyers and entrepreneurs on such matter. This change has been addressed towards the use of a more flexible conflict resolution option, and considered in some cases, fairer and more specialized.

In the twenty-first century, despite the existence of useful mechanisms to reach a better way of dispute resolution, an important advance in this matter glimpses, as consequence, without a doubt, of the necessity that independent countries have to continue adapting

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<sup>1</sup> Short for the Organization of the Petroleum Exporting Countries. OPEC is an international organization with a mission to coordinate and unify the petroleum policies of the Member Countries and to ensure the stabilization of oil markets in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers and a fair return on capital to those investing in the petroleum industry.

themselves, with a clear intention of improvement, to the new requirements that society imposes. Although it is certain that the specific subject of the Oil & Gas conflict resolution through the ADR has gone in good way, it is also certain that we still find many barriers, either cultural, social, legal and political, amongst others, that have not allowed a greater advantage of so extraordinary mechanisms.

The analysis of the actual status of ADR in the Oil & Gas industry in Mexico, as well as the mentioned barriers is the main purpose of this research. In other words, the problem which is the object of the present research is indeed: the necessity to adapt the ADR mechanisms to the actual situation of the Oil & Gas industry in Mexico, considering not only the legal development but also the cultural, social, legal and political barriers that, in some extend, are blocking the use of such an extraordinary way to settle disputes.

The research is focused on the case of Petróleos Mexicanos (PEMEX) which is the Mexican Oil & Gas Company, with a major impact at the international Oil & Gas market. PEMEX, ranked as No. 11 in the Oil & Gas Company list, is the Mexico's state-owned petroleum company.<sup>2</sup> It is the biggest enterprise in Mexico and Latin America and the highest fiscal contributor to the country. It is one of the few oil companies in the world that develops all the productive chain of the industry, upstream, downstream and final product commercialization. With headquarters in Mexico City, PEMEX is the sole supplier of all commercial gasoline (petrol/diesel) stations in Mexico.<sup>3</sup>

The intended research was thought to deal with legal and socio-legal aspects. The socio-legal science is hardly considered when resolving an international Oil & Gas dispute. Aspects such as: legal culture; human rights; the real justification of the ADR used; the contextualization of the case; the deep analysis of the leading cases; the economic, social and political repercussion of the award, not only for the country but also for the individual unconnected to the dispute; the role of the arbitrator and mediator as the decision-maker; and the perspectives of international Oil & Gas arbitrations and mediations, are some aspects highly recommended to be considered by the ADR participants in an Oil & Gas dispute.

This research will represent an opportunity to go deeper, in different extends, on the analysis of some of the before mentioned aspects. By now, it is only worthy to highlight the fact that throughout history, PEMEX has shown to be a company which disputes were only resolved by national courts and since a pair of decades ago ADR have been lightly considered. Recent history has also shown that PEMEX faces socio-legal obstacles that have prevented it from developing such an advisable industry of the ADR.

The previous statements have been the base and justification for the research herein developed, having the target to detect such obstacles to be able to propose some legal and practical solutions to overcome the problem, improving the usage of ADR when resolving

<sup>2</sup> The Top 100 Companies, Energy Intelligence Research, OPEC Library, 2008, pp. 15

<sup>3</sup> For further information on PEMEX and its activities, see *infra* pp. 221.

PEMEX disputes. This can be considered, from our point of view, an invaluable support to the development of the domestic economy.

The main repercussion of this research would fall into companies and countries involved in the Mexican Oil & Gas industry. Generally speaking, many benefits can be listed for PEMEX, as well as for the investor companies and the companies that are permit-holders to explore and exploit Oil & Gas in this country.

One of the many advantages that this research would bring will be the promotion to the local legislative changes and in the international level to allow a better mechanism to generate and sale Oil & Gas. It will also promote a more “friendly” atmosphere between the parties in a dispute. This generally represents the continuity in the commercial relationships and the respect to the sovereignty of the countries where the investment is carried out. On the other hand, legal science and socio-legal professionals, which will have access to the result of this research, will have available some updated information and statistics.

Legal science will be enriched by this research by providing some support to those legal branches that, as it will be mentioned later on, are in a growing process with very good expectations to reach an independent and autonomous level. Legal sociology will be also enriched since the socio-legal obstacles that prevent PEMEX from using arbitration and mediation will be detected and a determination of the status of the ADR legal culture will be discussed.

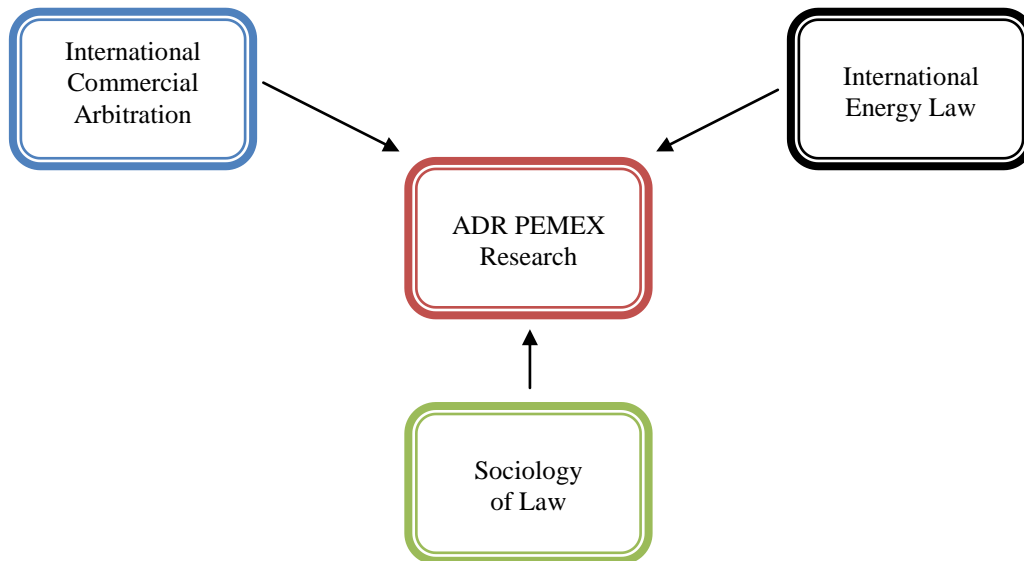
As indicators, the case-law analyzed in this research will serve to determine precedents, as well as to set up statistics as for the type of contracts from which the dispute arose, nationality of the parties, the lawyers, the mediators and arbitrators, the amount of the dispute and finally the direction of the award or mediators opinion.

## **1.2 Location of the Research.**

The proposed research is located at the intersection of three law branches. If it is true that these branches have not been considered independent and autonomous branches, they have enough structure, in both national and international contexts, to reach the desired objectives. These three branches are: (i) international commercial arbitration; (ii) international energy law; and, (iii) Sociology of Law.<sup>4</sup>

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<sup>4</sup> As commented by Reza Banakar and Max Travers, whether socio-legal studies is regarded as an emerging discipline, subdiscipline or a methodological approach, it is often viewed in the light of its relationship to, and oppositional role within law. Banakar, Reza and Travers, Max, “Theory and Method in Socio-legal Research”, Edited by Reza Banakar and Max Travers, The Oñati International Institute for the Sociology of Law. Hart Publishing, Oxford and Portland Oregon, 2005, pp. Introduction xi.



### 1.3 Objectives of the Research.

In total agreement with Gregorio Robles, the main objective or main goal of our research is well suited to what he considers what should be the object of sociological research of institutions (in this case the institution of ADR in Oil & Gas). He considers one must determine the institutions' validity, by determining: (i) the positivity of the institution, this is the real emergence in the social net, (ii) the effectiveness and ineffectiveness of the concerned institution, which implies the investigation of the degree or level of real social establishment of the institution, (iii) prediction of the institutional future, it means, to know in advance what will happen to the existing institution. The task of predicting is linked to the knowledge of the past and present institutional reality, (iv) the functional analysis of the institution that aims to understand each particular institution in connection with the rest of the institutions that compose the system.<sup>5</sup>

These goals can be fulfilled by applying different theories or approaches. In this case, we decided to apply the Theory of Legal Culture with the support of the Theories of ADR, Conflict Resolution and Sociology of Oil, as it is fully explained in Chapter V of this paper.

By fulfilling such goals, we will be able to assess the validity of ADR in Oil & Gas disputes, and if so the case, the effectiveness of such mechanisms in this kind of disputes. As a consequence of our research we will provide the people involved in PEMEX ADR (attorneys at law who draft the arbitration clause, the party lawyers, the third involved – arbitrator or mediator –, the ADR administering institution, the national and international bodies involved with the Mexican Oil & Gas industry, and, the participant players at the energy globalization, in this case PEMEX itself), more elements to obtain the fairest, fastest and most specialized possible solution.

<sup>5</sup> Robles, Gregorio, "Sociología del Derecho", Tratados y Manuales, Editorial Civitas, S.A., Segunda Edición, Madrid, 1997, pp. 82–83, 182-183.

Now, there is a question which needs to be answered: How to reach this main objective? In order to answer this question, and with the only purpose to highlight the duality of the project<sup>6</sup>, considering not only a legal analysis but also a socio-legal analysis, we mention that such objective will be fulfilled by fulfilling the following particular objectives, which are divided into two aspects:

### **1.3.1 The Legal Analysis.**

- (i) To obtain the kind of business and investment projects carried out at the Mexican Oil & Gas industry, including the possible causes of disputes.
- (ii) To obtain a common denominator amongst the different types of disputes arisen in the Mexican Oil & Gas industry. Both the problem as well as the mechanism used is included.
- (iii) To carry out a Mexican legislative analysis. Domestic and international legislation is considered on both fields Oil & Gas and ADR.
- (iv) To carry out a case-by-case analysis in order to get the “leading cases” that had set up ADR precedents.
- (v) To propose the use of new ADR methods that suits the necessities of the Mexican Oil & Gas disputes.
- (vi) To set up, if possible, the structure of a new arbitral and mediation institution that handles the administration of Oil & Gas disputes.

### **1.3.2 The Socio-Legal Analysis.**

- (i) To carry out a critical analysis of the globalization process of the Oil & Gas Industry and mainly of the PEMEX participation in such an international market.
- (ii) To contextualize the historical situation and the socioeconomic situation of the evolution of the Mexican Oil & Gas industry, the evolution of PEMEX as the most important Latin American company and one of the most important in the world, as well as of the PEMEX arbitration and mediation cases.
- (iii) To carry out, as long as the situation and the agreement with PEMEX allow it, a case by case analysis of all those mediations and arbitrations where PEMEX has been a part of, considering all the elements foreseen in the hypothesis mentioned below.

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<sup>6</sup> The research will be conducted considering this duality at the same time and the thesis will not be divided into two different parts.



- (iv) To do an analysis of the economic power of PEMEX over the political power of the State, as well as the social responsibility of such an entity.
- (v) To do an analysis of the economic, social and political impact of the mediation and arbitration cases and the impact they have had in individuals and companies unconnected to the dispute.
- (vi) To try to detect the social values that must be considered by the mediator and arbitrator when resolving a dispute.
- (vii) To do an analysis on the economic and social situation existing before and after the Oil & Gas dispute is resolved, considering all the entities or individuals involved in it, in order to establish the advantages and disadvantages for applying ADR procedures.
- (viii) To carry out a social research field with both quantitative and qualitative methods, as fully explained below, by interviewing key actors in Oil & Gas disputes in Mexico.
- (ix) To develop a statistical analysis of the arbitration and mediation of the Oil & Gas PEMEX cases,
- (x) To apply the socio-legal theories on ADR and legal culture and to develop own comments on it and if possible, a contribution to this area.
- (xi) To establish the perspectives of PEMEX arbitrations and mediations.

## 1.4 Hypothesis.

The hypothesis, as its etymological root indicates, comes from the Greek words “thesis” and “hipo”, which means “what it assumes” or “what it is put underneath”. In other words, it is the arranged expression of what we think that it will explain all the process of research.<sup>7</sup> In this order of ideas, and considering the two moments in the use of the hypothesis established by Duverger<sup>8</sup>, being the first one, the definition of the hypothesis of the work and, a second moment, the verification or rebuttal of the hypothesis, we can consider that the General or Central Hypothesis of the present research is:

### 1.4.1 General or Central Hypothesis.

**“The alternative dispute resolution methods (better known as ADR) have demonstrated to be a very recommendable mechanism to resolve international controversies mainly those where the amount of the controversy is high, as it is the case of those arisen in the Oil & Gas**

<sup>7</sup> Robles, Gregorio, Op.cit, footnote No. 5, p. 304.

<sup>8</sup> Duverger, Maurice, “Métodos de las Ciencias Sociales”, Editorial Ariel, Barcelona, 1972, pp. 385.

*industry. Nevertheless, some factors of legal, educational, cultural, social and political nature exist, that have not allowed that said ADR have reached the wished degree of optimization in PEMEX.”*

From another point of view, the general hypothesis indicated above can become the following initial question, which we will try to answer after this work:

### ***Does ADR Legal Culture really exist in PEMEX?***

#### **1.4.2 Complementary Hypotheses.**

On the other hand, we have established complementary hypotheses, also known as dependent or related hypotheses which will help us to take care of the Central Hypothesis. These Complementary hypotheses are:

***1.4.2.1 Complementary Hypothesis No. 1. International Commercial disputes, mainly those related to public works, where PEMEX is a part of, are mainly resolved by the intervention of national courts, and ADR are hardly used due to the following factors:***

***1.4.2.1.1 Legal. The deficiency of Mexican legal provisions that prevent the parties in an dispute from having a satisfactory and voluntary use of these mechanisms, as well as the legislative deficiency that prevent investors from having a safe legal framework when deciding whether or not to invest in Mexico.***

***1.4.2.1.2 Educational. The lack of legal education in the ADR field of those who commonly intervene in the decision making process of selecting the suitable method when a dispute arises as well as those who intervene during the ADR process until the recognition and enforcement of the award, when an ADR is rarely agreed.***

***1.4.2.1.3 Social. The legal nature of the entity and the stratum to which PEMEX belongs, does not allow it to use ADR in the day-to-day administration of its public work contracts.***

***1.4.2.1.4 Political. The structure of the Mexican Oil & Gas industry and the structure of PEMEX itself, are affected by the decisions and influence made by the political parties in Mexico. Thus, the applicability of ADR depends on great extend on the political party that PEMEX top officials belong and the policy they are instructed to follow.***

***1.4.2.1.5 Cultural. The existence of uses, customs and traditions in PEMEX, have restricted that entity, almost automatically, to analyze the***

*convenience of applying a mechanisms more flexible, practical and of greater benefit, such as ADR. Therefore, one could hardly talk on an ADR legal culture inside PEMEX.*

**1.4.2.2 Complementary Hypothesis No. 2.** *In Mexico there has been a change as for the use of ADR amongst the legal agents, namely lawyers, judges, scholars, and researchers. However, there is still a path to go through and some levels to climb to equal our north neighbours and other countries which are top participants in the ADR world industry. Therefore, one could talk on an ADR legal culture in Mexico, if not equal to others around the world, but with promising expectations.*

**1.4.2.3 Complementary Hypothesis No. 3.** *The history of the Mexican Oil & Gas industry as well as the history of PEMEX have been a key factor on the development of the use of ADR. Mexico has been adapted, in certain way, to the Oil & Gas industry and the protectionist and nationalist sentiment of the industry has influenced to get its conflicts resolved by the national judicial system instead of profiting from alternative methods which might be considered against the country's sovereignty.*

## **1.5 Research Methodology.**

As the word “methodology” is defined, from an etymological point of view, “meta” (throughout) and “odos” (way)<sup>9</sup>, the present research has got the objective to arrive at a goal previously established going through all the way herein explained.

In agreement with Reza Banakar and Max Travers, a range of methods are used in socio-legal research ranging from the statistical analysis of survey research to the analysis of transcripts from tape-recording of judicial hearings. There are socio-legal researchers who have employed quantitative methods, qualitative methods or a combination of both in addressing socio-legal questions. They continue saying that the problem, from their perspective, is that many of these studies have been conducted by researchers outside the law school.<sup>10</sup> Ours, as explained below, is a combination of quantitative and qualitative methods.

Like every research, the present has had as departure point the affirmation that we face a problematic situation, it means, that one mentioned in the previous points of this paper. Our research will be a mainly “descriptive”, since we try to describe the reality of ADR at the Mexican Oil & Gas Industry, with the understanding that this is a “legal phenomenon” for all the purposes of the methodology research theories. Although, descriptive research is also called Statistical Research, considering its main goal to describe the data and characteristics about what is being studied, we focused our work a lot on the qualitative

<sup>9</sup> Robles, Gregorio, Op.cit, footnote No. 5, p. 286.

<sup>10</sup> Banakar, Reza and Travers, Max, Op.cit, footnote No. 4, pp. 17.

method. The idea is to study frequencies, averages, and other statistical calculations complemented with what we would be told on interviews. Along with the descriptive research, it has been planned to use a deductive reasoning in order to use a process of reaching conclusions. As commented by María José Fariñas Dulce, while speaking of inductive and deductive theories, the second includes the reasoning from a logical and theoretically expected schema to observations that test whether the scheme expected is effectively present.<sup>11</sup>

Therefore, we used the following research methods and techniques in our work, which far from being exclusive from each others, they are complementary. We always consider the necessity of a close attitude to the objectivity and neutrality required for these works, as it is well recognized by García San Miguel, L. “it is precise to look for the objectivity, even if we know we are only able to reach it partially”.<sup>12</sup>

The before mentioned makes this research a work of methodological pluralism, which will allow us, from our point of view, to try to obtain a full covered research and with the awaited results. Following up, the methods and techniques to be used are mentioned, with the understanding that the latter are the concrete procedures that make operative the former.

### 1.5.1 Methods.

**1.5.1.1 Historical Method.** Like any legal phenomenon, we try to analyze the ADR used in the conflicts arisen in the Mexican Oil & Gas industry, from an historical point of view. To get this goal, we analyze the beginning and evolution of the petroleum industry, of PEMEX itself and the of the ADR methods used until arriving at the present situation. This will allow us to know the factors and historical forces that have determined their present reality and to find the causal relations between the reality of ADR in Oil & Gas and the undergone changing process. The analysis includes the social, legal, economic and moral causes, which have determined the appearance of ADR in Oil & Gas in PEMEX. The historical method was used, among other things, by means of the analysis of cases, documents, legislation and other characteristic sources of this method.

**1.5.1.2 Comparative Method.** An angular stone of our research will be the comparative method. The analyzed legal phenomenon, by its nature, is perfectly adapted to this method. Thus, there is a comparative analysis on time and one on subject matter. The first one is a comparison between the time before the NAFTA where ADR was not used at the Mexican Oil & Gas

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<sup>11</sup> Fariñas Dulce, María José, “Fragmentos de Sociología del Derecho”, Diego Blázquez Martín, Rafael Escudero Alday, Carlos Lema Anón, Silvina Ribotta, Alejandro Soltonovich, Editorial Dykinson, S.L., Madrid, 2006, pp. 74-75.

<sup>12</sup> García San Miguel, L., “Notas para una Crítica de la Razón Jurídica”, Universidad Complutense, Facultad de Derecho, Sección de Publicaciones, Madrid, 1985, p. 96.

industry at all, and the time after such international document. On the other hand, the second one is a comparative analysis amongst the arbitration cases where PEMEX has been a part of. We will see that they are cases that are neither completely different nor completely equal. They are simply legal phenomena that share certain common elements with some different characteristics. Some of the hypotheses previously expressed will be susceptible to be confirmed or to be refuted with the results of the comparative analysis.

**1.5.1.3 Quantitative Method.** As it is indicated by its definition, this method has been used for “quantifying” the legal phenomenon of the ADR in the Mexican Oil & Gas industry, by means of searching and obtaining numeric data that will allow us to have a greater understanding and explanation of the faced problem. Although the explanation of the phenomenon does not have to be merely quantitative, the analysis of numbers and elaboration of statistics assists in joining this method to the qualitative analysis, because far from sharing the idea that some authors maintain in the sense that both methods are opposed, we considered, as the majority does, that these methods are complementary. The source for this analysis is the information gathered at PEMEX.

**1.5.1.4 Qualitative Method.** On the other hand, and as it is also denoted by its definition, this method has been used for “qualifying” the legal phenomenon of the ADR in the Mexican Oil & Gas industry, by means of searching the understanding and experience of the reality, thus to arrive at the interpretative knowledge of this legal phenomenon. With the use of this method, we know the meaning, the interpretations, the feeling, the behaviour and the perception that the social actors, namely arbitrators, lawyers, etc, have, in relation to this legal phenomenon; in other words, its reality. We try to investigate the why and how of decision making, not just what, where, and when. Hence, smaller but focused samples will be more needed rather than large random samples.

## **1.5.2 Techniques.**

**1.5.2.1 Documentary Research.** Being the most used technique in the research processes, in this one it will not be the exception. The documentary research will include:<sup>13</sup>

**1.5.2.1.1 Articles and Books.** Articles and Books are the most important source in this research. It has to be mentioned that the number of articles and books in ADR and related topics and Oil & Gas is high. However, there is little literature on the specific topic of ADR in Oil & Gas. Therefore, the purpose will be to generate further literature on this field.

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<sup>13</sup> A significant part of communications constituting the law and legal practice is either conducted through written documents or recorded in textual forms such as in statutes, cases, opinions, commentaries or law reports. Banakar, Reza and Travers, Max, Op.cit, footnote No. 4, pp. 134.

**1.5.2.1.2 Case Study.** The Sources for the knowledge of arbitration cases are generally found in the files of the cases and in documents that explain a summary. As indicators, the case law analyzed in this research helps to determine precedents, as well as to set up statistics as for the type of contracts from which the dispute arose, nationality of the parties, the lawyers, the mediators and arbitrators, the amount of the dispute and finally the direction of the award or mediators opinion.

**1.5.2.1.3 Legislation Analysis.** A Mexican legislation analysis will be done, for both ADR and Oil & Gas. The source has been the codes or set of norms or the documents that contain information on the cases that have formed jurisprudence in certain subjects.

### **1.5.2.2 Field Research Plan.**

We requested PEMEX to spend some time inside the entity to carry out our field research plan. The permission was granted a year after the request, which was in fact an evidence of what we would find inside. It has also to be mentioned the visit to the OPEC<sup>14</sup> we carried out on July-August 2009 which was very profitable since much written information was obtained from its library, as well as personal contact was done with some officers who were willing to help us with our research.

The idea of the field research was to be able to “live” the topic of ADR inside PEMEX and to have a major sensitivity with respect to some issues mainly related to legal sociology. By doing so, we could fulfil the following goals:

#### **1.5.2.2.1 Visit the In-House Library.**

As part of the field research plan, we visited the in-house library in PEMEX, which is known as the “Historical Archive of PEMEX” and which has an invaluable collection of documents that only occur in this library. The visit to the library and the talks we had with its director, mainly served us with the historical research of the Oil & Gas industry in Mexico and with understanding the evolution of the Mexican Oil & Gas company.

#### **1.5.2.2.2 Files Consultancy.**

We did have access the arbitration files. These files mainly consisted on: the request for arbitration, the answer to the request of arbitration, the terms of reference, partial awards, if so rendered, and final awards, as well as all the communications between the parties and the arbitral tribunal. By consulting the files, we had the opportunity to realize the facts of the disputes and the legal arguments of the parties. Our task was not to go that deep into

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<sup>14</sup> See supra footnote No. 1.

the files to know the way each party presented their case, but to be able to know the “*litis*” and get a feeling on several issues such as the way the case was resolved and the acting of all the participants. In chapter V of this paper, a summary of each case is foreseen where the main characteristics of each case can be noted.

#### **1.5.2.2.3 Observation.**

Observation is a fundamental tool in every research. In ours, we had the opportunity to know the way PEMEX deals with its disputes, not only by using arbitration but also the traditional method. We could talk with people who work in PEMEX in the different areas which are explained in chapter V. These informal “talks” which cannot be deemed as “interviews” as those below mentioned, were very useful to help us realize how the situation of ADR in PEMEX was. All those obstacles of which we make reference in chapter V were easily detected by observing the working atmosphere.

#### **1.5.2.2.4 Interviews.**

On the other hand, as the representative technique of the qualitative method, interviews were prepared mainly addressed to the people who have acted as fundamental actors in ADR processes when resolving PEMEX conflicts, as it is the case of lawyers who act as arbitrators, legal counsellors, as well as in-house lawyers and technical assistants inside PEMEX.

##### **1.5.2.2.4.1 Interviews Plan.**

The purpose of this plan was to determine the candidates to be interviewed, the procedure of the interviews, the direction the questions would have as well as the kind of information expected to be collected from the interviews.

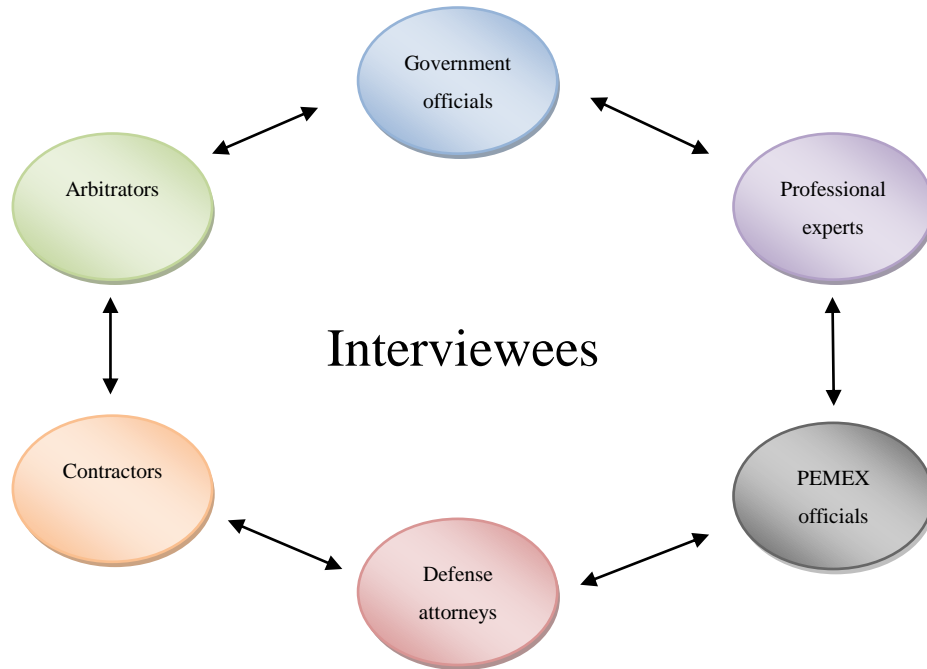
##### **1.5.2.2.4.2 The Candidates.**

It was expected to interview “key” people who have participated, or have been in anyway involved, at PEMEX’s ADR proceedings. The idea has been to learn various aspects and angles of the situation. Candidates were grouped as follows: (i) top-level government public servants of the Mexican energy sector; (ii) professional experts in the field of the Oil & Gas industry in Mexico; (iii) PEMEX officials who have directly participated in procedures of alternative dispute resolution in PEMEX; (iv) independent legal professionals who have acted as party defense attorney; (v) contractors who have been counterparties in a PEMEX ADR procedure; (vi) expert arbitrators with recognition at the field of Oil & Gas disputes in Mexico.

The candidates complemented each other since they are connected in a way, but at the same time belonging to different areas. This let us structure the questions in order to get different



approaches from the same questions. Below, there is a graphic that allows us to understand the candidates and their different approaches.



#### 1.5.2.2.4.3 Interview Procedure.

First, questions formulated for each of the candidates were carefully prepared, taking into account: the position they occupy, their participation in the proceedings in which PEMEX has intervened, as well as the place they occupy in the Mexican Oil & Gas industry and in the industry of alternative dispute resolution methods in this country. Once the model questions which were to be asked to each of the candidates were carefully planned, “model” interviews were prepared. Subsequently, and previous authorized appointment, the candidates were personally interviewed with the support of a “voice recorder” which kept the respondent’s opinion in an electronic file directly into the computer. The interviews were transcribed in “paper” to be preserved and were attached to this PhD thesis, as an exhibit.

#### 1.5.2.2.4.4 Model Interviews.

As mentioned before, the questions were carefully selected depending on the person they were going to be addressed. Some questions were the same but the outcome was different in many cases. Some questions were specifically addresses to a group of people (i.e. arbitrators). We grouped the model interviews in different groups considering their target. These “models” interviews were arranged as follows:



- Model A.** Interviews marked as “Model A”, were those to be carried out to people who know the Mexican Oil & Gas sector, either thru centralized or decentralized government or as independent professionals. These candidates, due to their career, are considered “experts” in this field. The purpose of these interviews was to know why alternative dispute resolution methods have not had the expected use in conflicts in which a decentralized company as PEMEX takes part, as well as the trend there is in this country as for their use.
- Model B.** Interviews marked as “Model B” were those to be carried out to people who have been directly related to mediation or arbitration proceedings in which PEMEX has been a party of, either as in-house counsellor, external counsellor, or the people who were involved with such procedures in a “day-to-day” basis. This kind of interviews was grouped into 3 different groups, depending on the PEMEX’s subsidiary which was party in the proceedings:
- “B-I”: PEMEX Refining;  
“B-II”: PEMEX Exploration and Production (PEP);  
“B-III”: PEMEX Gas and Basic Petrochemicals (PGPB).
- Model C.** Interviews marked as “Model C”, were those to be carried out to people that have contracted with PEMEX in one or several occasions, both services and goods. They are owners or representatives of private companies who will let us know the view from the other side of the coin in the negotiations with the most important company in this country and, consequently, from the other side of the controversy.
- Model D.** Interviews marked as “Model D”, were those to be carried out to people who have acted as arbitrators in both, disputes where PEMEX has had a participation and in international disputes on the Oil & Gas industry. Their opinion was very important to know the place where PEMEX is found at the international market of the ADR industry.
- Sub-model a.** Interviews marked as "sub-model a" are those identified for people involved in mediation or arbitration proceedings in which PEMEX or its subsidiaries take part and where they have decision-making powers.
- Sub-model b.** Interviews marked as "sub-model b" are those identified for people involved in mediation or arbitration proceedings in which PEMEX and its subsidiaries take part and where they have been involved in the day-to-day management of the procedures, both from a legal point of view as from a practical one.
- Sub-model c.** Interviews marked as "sub-model c" are those identified for people involved in mediation or arbitration proceedings in which PEMEX and its subsidiaries

take part and where they have been in charge of external legal advice in such proceedings.

- 1, 2, 3 ....** The indication of the Arabic number mentioned in the type of interview model, aims to simply list the chronological order of the candidates within the particular group, in which the results of the interviews were presented for the analysis and subsequent inclusion into the Phd thesis.

## **CHAPTER II**

### **ADR in Oil & Gas.**

*“The subject is the problem; the form, the solution”  
Friedrich Hebbel*

## **2.1. The Concept of ADR.**

### **2.1.1. What is ADR?**

Well known simply as ADR, this term is the acronym of Alternative Dispute Resolution, but is increasingly called “Appropriate” Dispute Resolution.<sup>15</sup> The concept has also been redefined as “Dispute or Conflict Management or Resolution”.<sup>16</sup> It refers to those methods used as an alternative to the court administration system, which has been the traditional way for dispute settlement. Marc Galanter has highlighted the fact that trials before courts have declined and little by little have been replaced by ADR. He believes that trials are declining not only in relation to cases brought to courts but also to the size of the population and the size of the economy.<sup>17</sup> Even though Galanter refers mainly to cases taken to North American courts, this phenomenon has shown up in every part of the world, with no matter of the legal, political and economic system.

ADR has its origin in the Common Law system<sup>18</sup> where these methods have had an excellent acceptance and everything seems to indicate that their use is being propagated more and more in all the legal systems. Particularly, in the United States of America, under the auspices of the AAA<sup>19</sup> and of other institutions, ADR have been used a lot bringing to an end a great number of controversies, both national and international, mainly those where one of the involved parties is North American. Sharing the idea of Lord Goff,<sup>20</sup> a fact that could have influenced the great success of ADR in the North American country is that the others are extremely onerous, reason for which new options, that keep the parties away

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<sup>15</sup> This term usually connotes “alternative” dispute resolution, but is increasingly called “appropriate” dispute resolution, to reflect the fact that most disputes and cases are dealt with outside of trial, so that full-scale litigation, in the form of trial, is really the alternative. Albie Davis & Howard Gadlin, “Mediators Gain Trust the Old-Fashioned Way-We Earn it!”, 4 Negot. J. 55, 62, 1988.

<sup>16</sup> Menkel-Meadow mentions that this concept assumes that the dispute and conflicts will be finally put down or ended, when in reality, conflict may continue in a different form or may be productive in some way so that it should not be squelched. Menkel-Meadow, Carrie, “Mothers and Fathers of Invention: The Intellectual Founders of ADR”, Ohio State Journal on Dispute Resolution, Volume 16, Number 1, 2000.

<sup>17</sup> Galanter, Marc, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts”, Journal of Empirical Legal Studies, Volume I, Issue 3, 459-570, November 2004, p. 460.

<sup>18</sup> It is one of the legal systems in the world. The other legal systems are: Civil Law System, Muslim Law System, Consuetudinarium Law System, and Mixed Law System.

<sup>19</sup> See infra footnote No. 539

<sup>20</sup> Robert Lionel Archibald Goff, Baron Goff of Chieveley PC DCL FBA who is a well recognized British Judge. This comment was said in a conference in 1990 in Hong Kong.

from courts and from arbitral centres<sup>21</sup>, have been developed. Recently they have had good acceptance in England,<sup>22</sup> Asia<sup>23</sup> and Latin America.<sup>24</sup>

ADR are based on the resolution of controversies in accordance with procedures destined to avoid excessive expenses and delays that we normally found in the traditional method. Although we will notice some exceptions when analyzing each ADR, it can be said that the common characteristics of ADR are mainly the following: (i) the necessary consent of the parties for its adoption; (ii) the participation of a third party with faculty to render his/her opinion; (iii) privacy; (iv) informality, rapidness, and a less onerous resolution of the conflict; (v) the non-binding nature of the outcome, advice or decision, in case of mediation, and a binding nature of the award, in the case of arbitration<sup>25</sup>; (vi) a friendly solution, which is very important for a good reputation in the business world.

Without considering arbitration, it could be thought that ADR processes are absurd and unsuitable, since the outcomes are simple opinions that are not binding to the parties; nevertheless, the success of its use must be, in a large extent, to the fact that commercial relations between the parties will normally prevail after the conflict.

All ADR demand an important degree of flexibility and cooperation from the parties in the definition of the dispute, as well as in the search of the resolution of the controversial

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<sup>21</sup> Some authors consider arbitration as an ADR and some exclude it from ADR. Our opinion, as it will be treated in this document, is that arbitration is another ADR, indeed the most important and used.

<sup>22</sup> In a declaration issued by the Commercial Court in London in 1993, the Justice Cresswell confirmed that the Court wished to encourage the parties to consider the use of ADR, such as mediation or conciliation. While he emphasized that the judge would not act as a mediator or conciliator, he would simply invite the parties, in certain cases, to consider ADR methods, for which lists with names of people with broad experience are available. Later, in January of 1995, a Practical Directive at the English Supreme Court issued by Lord Chief Justice and the Vice Chancellor was made, in which the solicitors are requested, in actions before the Supreme Court, to sign and fill in a questionnaire that includes the following questions: (i) have you discussed with your client the possibility of resolving this controversy by means of an ADR?; (ii) is there any form of ADR that would be beneficial and with great perspective to resolve the dispute?, and; (iii) have you, or has your client discussed with the other party the possibility of resolving this controversy by means of an ADR?. Although the Directive is careful with the voluntary nature of ADR methods, the questionnaire recognizes that it is the lawyer's obligation the promotion and information to the client of such methods. Connerty, Anthony, "The Role of ADR in the Resolution of International Disputes", "Arbitration International, Vol 12, No.1, p. 47-55, LCIA, 1996.

<sup>23</sup> For further information on ADR in Asia, see. Asian Dispute Review, edited by Hong Kong International Arbitration Centre, Chartered Institute of Arbitrations (East Asia Branch), Hong Kong Institute of Arbitrators and Hong Kong Mediation Council.

<sup>24</sup> As pointed out by Sgubini, Prieditis, and Marighetto, in all parts of the world, including North and South America, Asia, and India, large and small commercial entities are recognizing the business benefits of mediation. According to international and European trends, mediation is emerging as an effective and often preferred method for private commercial companies and government agencies to fulfil their organizational objectives by privately and promptly resolving disputes in a manner that saves time, money, and business relationships. Sgubini, Alessandra, Prieditis, Mara and Marighetto, Andrea, "Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective"; Mediate.com; August 2004.

<sup>25</sup> Consequently, a court is not obliged to stay a procedure before it, when it finds out that a mediation agreement exists, as it happens when there is an arbitration agreement.

issues. Also, the selection of the suitable ADR is not easy. As Sander, Goldberg and Rogers recognize, there are some factors that should be considered when making the determination as for the ADR to be used, such as: the nature of the case, the relationship between the parties, the relief sought by the plaintiff and the size and complexity of the claim.<sup>26</sup> In addition, we can add the amount of the dispute, the object of the controversy, and the required expertise to resolve it.

### 2.1.2. Why ADR?

In order to explain the reason why human beings have used ADR, we have first to talk about maintenance of social peace. Social peace is the result of the control of small group over their members. The State, as political organization of the society and in order to making peace possible, holds the monopoly of social power and social violence. As Robles thinks: Paradoxically, the State, that is the institution of the organized social violence, becomes a guarantor of peace, by preventing the individuals from the use of private violence.<sup>27</sup> Robles continues thinking that social peace is a consequence of the institutionalization of violence thru the law.<sup>28</sup> Nevertheless, with the intervention of the State and law, conflicts do not finish, since conflicts are an inherent phenomenon to each society and the more complex the society is, the higher number of conflicts will appear. Thus, the concepts of conflictualism and sociology of conflict are born amongst sociologists.<sup>29</sup>

The conflictualists consider that the conflict is a functional factor of the life of the human group and his evolution. It would go against the thought of which the conflict is something pathological. In other words, the conflictualists consider that conflicts are healthy in societies, emphasizing their “normal” character in the sense that they belong to the way of being of an alive and dynamic society. We make a comparison, if it is allowed, with the development of the human body. Humans during their life face many diseases, which, somehow, although harmful, are also part of their development. Diseases allow humans to grow and to be stronger. Nevertheless, the previous thing does not mean that humans should not fight to remedy these diseases. From our point of view, the same happens to conflicts in a society.

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<sup>26</sup> Goldberg, S, Sander, F, and Rogers, N., “Dispute Resolution: Negotiation, Mediation, and other Processes”, Second Edition, Boston, Little Brown, 1992.

<sup>27</sup> There are some exceptions to this rule, as it is the case of the state of necessity, legal self-defense, amongst others.

<sup>28</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 169.

<sup>29</sup> According to Simmel, the sociology of conflict establishes that the conflict has a sociological significance, inasmuch as it either produces or modifies communities of interest, unifications or organizations. It is in principle never contested. On the other hand, it must appear paradoxical to the ordinary mode of thinking to ask whether conflict itself, without reference to its consequences or its accompaniments, is not a form of socialization. This seems, at first glance, to be merely a verbal question. If every reaction among men is socialization, of course the conflict must count as such, since it is one of the most intense reactions, and is logically impossible if restricted to a single element. The actually dissociating elements are the causes of the conflict - hatred and envy, want and desire. Simmel, Georg, “The Sociology of Conflict: I”, American Journal of Sociology, 9, 1903, pp. 490-525.

Democracy, from the sociological point of view, is a way to resolve social and political conflicts through an agreement on procedures previously laid down. In this game of democracy and the resolution of conflicts there are two very important participants: judges and law. The first ones, as it will be seen later on, are invested with authority to resolve conflicts, as representatives of the State, based on the provisions that the second one, it means, the law, anticipates. This is call, the Social Functions of Law.

Nevertheless, the work load of judges is incalculable and humans have created parallel mechanisms to the work of resolving these conflicts,<sup>30</sup> respecting the limitations that the law imposes, as it is the case of the award enforcement. Here is where ADR show up. Law does not always act as an stabilizing element with respect to social conflicts, sometimes is the law itself that causes the conflicts.

In a world where commercial operations exist, where parties of diverse countries and diverse legal systems take part, we will always face the possibility of conflict of norms (including the provisions of a contract) that will be transformed into a conflict between the parties. Thus, when the parties' agreement is not fulfilled, or when different interpretations arise, or when externalities<sup>31</sup> that affect the legal relation between the parties appear, it will be required the use of a mechanism, either judicial or extrajudicial (ADR), to resolve this conflict.

We agree with the opinion of Arnaud and Fariñas in the sense that “increasingly more, the cases in which the courts are not able to satisfy the needs or the expectations of the parties, are more numerous. The same happens where the formal mechanisms of conflict resolution, according to the ordinary judicial procedure, do not work or are revealed as of difficult adaptation. Mediation and arbitration acquire, in our countries, great dimensions”.<sup>32</sup>

Therefore, we can emphasize the existence and pre-eminence of some contemporary paradigms that dominate the socio-legal studies: there are those of legal regulation and those of informal mechanisms of conflict resolution. To these, it can be added the one of soft law, expression created by the Anglo-Saxon colleagues by opposition to the concept of law that has a necessary connotation of “state law”.<sup>33</sup>

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<sup>30</sup> Robles establishes that judges can be appointed by the parties in certain cases where legislation authorizes to do so (arbitrators). But in most of the cases, the judge is a body of the State and belongs to the institutional staff of law. Robles, Gregorio, *Op.cit*, footnote No. 5, pp. 170.

<sup>31</sup> The concept of externalities has been imposed by the slang of the called economic analysis of law with a great impact in recent times. Posner, Richard, “Economic Analysis of Law”, 2nd Edition, Boston/Toronto, 1977.

<sup>32</sup> Harrington, Christine B., “Shadow Justice. The ideology and Institutionalization of Alternative Court”, Greenwood Press, Westport, Connecticut, 1985, pp. 203.

<sup>33</sup> Arnaud, André-Jean, Fariñas Dulce, María José, “Sistemas Jurídicos: Elementos para un Análisis Sociológico”, Universidad Carlos III de Madrid, Boletín Oficial del Estado Madrid, 1996, pp. 203.

### 2.1.3. What is the Appropriate ADR?

The question of process selection presents one of the most challenging problems in the field of ADR. Sander and Rozdeiczner believe the following three questions are most helpful in selecting the most appropriate procedure: at what point does process selection occur?, do the parties need courts? and How should the neutral be selected?. Besides, they suggest that the following three key questions emerge for those seeking to design an appropriate method for selecting a dispute resolution process: what are the parties' goals for the processes?, what aspects of the dispute in question make it amenable to resolution by one or another process? and what contributions might each process make to overcoming impediments to effective resolution?<sup>34</sup> Tyler, on the other way, adds another important question focused more on the outcome of the dispute: what do people want from third parties and how do they evaluate them?<sup>35</sup> We prefer to leave those questions on the air, since many questions need to be answered before selecting the suitable ADR. However, we need to be in front of the specific case to consider the required questions as well as the corresponding answers.

In addition to the previously mentioned, it can be said that there is a normal process or at least, it should be a process when deciding the suitable ADR to use in a dispute. The initial determination will be made by each attorney in consultation with his/her client. However, the lack of knowledge of the attorney will lead to the lack of opportunity for his/her client to use an ADR, since clients, generally speaking, do not have enough information regarding the available options to bring to an end a conflict, different from the traditional court justice. As a second step, Sander and Goldberg mention that the attorneys will discuss with each other the decision each has reached with his/her client, and will seek to agree upon a procedure. If they do not agree, the complaining party will be free to take the dispute to court. Then if the court has an ADR program, as it is increasingly common, court personnel will decide if the dispute is suitable for that program. If the court's ADR program is optional, the parties will be free to reject the court's recommendation; but if that program is mandatory, the court will order the parties into some type of ADR.<sup>36</sup>

### 2.1.4. What are the Options?

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<sup>34</sup> Sander, Frank E.A., Rozdeiczner, Lukasz, "Selecting an Appropriate Dispute Resolution Procedure. Detailed analysis and Simplified Solution", Chapter Twenty-Four, *The Handbook of Dispute Resolution*, Jossey-Bass.

<sup>35</sup> Tom Tyler thinks that people want to win! Lawyers typically believe that clients evaluate them based on the size of the outcome they deliver when the case is settled, while judges think that they are evaluated based on the favourability of the verdict they reach. Tyler, Tom, "Procedure or result: what do disputants want from legal authorities?", *A Handbook of Dispute Resolution. ADR in Action*, Routledge and Sweet & Maxwell, London and New York.

<sup>36</sup> According to Sander and Goldberg, when considering the possibility to use an ADR, and when determining which one is the most appropriate for the case, the legal advisor should face two basic questions: First, what are the client's goals and what ADR is most likely to achieve those goals?, Second, if the client is amenable to settlement, what are the impediments to settlement, and what ADR procedure is most likely to overcome those impediments?. Goldberg, S, Sander, F, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure", *Negotiation Journal*, January, 2004, pp. 50.



We would like to start this part of this paper by quoting Menkel-Meadow who made an interesting comparison of ADR with social behaviour: “As one who believes deeply in multi-disciplinary study and multi-casual explanations of social behaviour, I think our field of “ADR” or conflict resolution is richer for its multiple sources of insights and sensitivity to the interactive effects of law and legal institutions with other social institutions.”<sup>37</sup> This comment denotes the variety of mechanisms we can face. And, as we will mention, the diversity depends on what the parties are looking for to resolve their dispute, as well as the needs on having a mandatory or non-mandatory outcome.

From the doctrinal point of view, the opinion of Alcalá Zamora, who goes in the same line of other authors like Sander and Goldberg, is of great importance, since he separates the diverse forms to resolve controversies into two mainstreams:<sup>38</sup>

1. The self-composite methods: according to which neither an award nor a judgement is rendered. The parties resolve the controversy by themselves or by a selected third party named conciliator or mediator that does not have binding faculties. In other words, if there is a third neutral party, he/she can only mediate or help the disputants achieve their own solution.

2. The hetero-composite methods: according to which the person who resolves, namely judge or arbitrator has got total binding faculties. In this case, the third neutral party has the power to adjudicate or impose a solution. Adjudication can be performed by a judge in a court or by a private adjudicator, it means, an arbitrator.<sup>39</sup>

We could find as many types of ADR as we can imagine, and they will be always catalogued into one of these two categories, depending the binding (adjudicative) or non-binding faculties of the third neutral party. If he/she has been invested with these binding or adjudicative faculties, either by a provision of law (judge) or by an agreement of the parties (arbitrator), the ADR will be addressed always to the second group and if he/she has not invested with such faculties, the ADR will be addressed to the first group.<sup>40</sup> The most

<sup>37</sup> Menkel-Meadow, Carrie, *Op.cit.* footnote No. 16.

<sup>38</sup> Heuer and Penrod have another classification, according to which there are five levels: (i) Autocratic: where the third party has total control over the presentation of evidence and the final decision; (ii) Arbitration: where disputants are provided with complete control over the presentation of evidence; (iii) Moot: the conflicting parties freely present their evidence to a third party who does not have complete decision control but rather shares an equal vote on the final settlement with the conflicting parties; (iv) Mediation: the third party has no formal decision control; (v) Bargaining: there is no third party involvement. See, Heuer, Larry B. and Penrod, Steven, “Procedural Preference as a Function of Conflict Intensity”, *University of Wisconsin, Journal of Personality and Social Psychology*, Vol. 51, no. 4, 700-710, 1986.

<sup>39</sup> Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Three types of disputes are resolved through adjudication: (i) Disputes between private parties, such as individuals or corporations; (ii) Disputes between private parties and public officials, and; (iii) Disputes between public officials or public bodies.

<sup>40</sup> Sander and Goldberg, in a foot note, mention a court-annexed arbitration, in which the arbitrator’s decision is not binding. Because disputing parties typically have no choice about whether or not to participate in court

known ADR will be mentioned bellow, however, some other hybrids can be already used or might be born in the future.

It seems there has been a debate on whether disputes must be resolved by settlement or by using an adjudication process, as we have previously divided the possible options to resolve conflicts. Menkel-Meadow makes an interesting summary on the different authors' positions,<sup>41</sup> concluding in his opinion that the debate while useful for explicitly framing the underlying values that support their legal system, has not effectively dealt with the realities of modern legal, political and personal disputes. For him, the question is not "for or against" settlement.<sup>42</sup> We strongly agree with Menkel-Meadow's opinion, since settlement or adjudication are very good options, we just need to analyse the situation, as we already mention, in order to know which one is the best solution for the particular case.

Menkel-Meadow keeps on mentioning that the difficulty with the debate about settlement vs. adjudication is that there are many more than two processes, as well as other variables that affect the processes, to consider. The diverse interests of the participants in the dispute, the legal system, and society may not be the same. Issues of fairness, legitimacy, economic efficiency, privacy, publicity, emotional catharsis or empathy, access, equity among disputants, and lawmaking may differ in importance for different actors in the system, and they may vary by case (this is the characteristic of the common law system).<sup>43</sup>

Finally, we just want to highlight that the parties have many options and they have the right to decide amongst these options since we will apply the transcendental question of Menkel-Meadow, which happens to be the name of his excellent article, *Whose Dispute is it Anyway?*, To whom does a dispute belong when it enters the legal system?, whose property is a particular dispute, and who should decide how it should be treated?. There is only one answer: "The parties".

#### **2.1.4.1. Negotiation.**

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annexed arbitration. To the extent that disputing parties, or court officials, have discretion whether to send a dispute to non-binding arbitration, the closest analogy to non-binding arbitration that is discussed in this article is early neutral evaluation. Goldberg, S, Sander, F, Op.cit. footnote No. 36, pp. 67. Our point of view is that, it does not exist such a "non-binding arbitration", if it is non-binding, then it is not arbitration and it is mediation. The essential characteristic of arbitration is the binding nature!

<sup>41</sup> Owen Fiss argued "Against Settlement", Trina Grillo and others against mediation, Richard Delgado and others have questioned whether informal processes are unfair to disempowered and subordinated groups, Judith Resnik has criticized the federal courts' unwillingness to do their basic job of adjudication; Stephen Yeazell has suggested that too much settlement localizes, decentralizes, and delegitimizes disputes resolution and the making of public law; Kevin C. McMunigal has argued that too much settlement will make bad advocates; and David Luban and Jules Coleman, amongst other philosophers, have criticized the moral value of the compromises that are thought to constitute legal settlement. Menkel-Meadow, Carrie, "Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)", the Georgetown Law Journal, Vol. 83:2663, pp. 2663.

<sup>42</sup> Menkel-Meadow, Carrie, idem.

<sup>43</sup> Menkel-Meadow, Carrie, idem.

It is the most recommendable and economic method, with great benefits for the parties. By using this method, both parts, directly or by the intervention of their lawyers, analyze the situation and with the universal measurer of justice, reach an agreement that is easy to develop. As there is not a third party involved, negotiation has the advantage of allowing the parties themselves to control the process and the solution. When the solution is found, the lawyers draft an agreement and after signing it, it became law to the parties.<sup>44</sup>

Negotiation theory is so broad that deserves, as it has been many times, a whole research on it. As the purpose of this paper is not specifically general negotiation, we will only highlight the basic characteristics of such an ADR.

Worth mentioning is the classification made by Menkel-Meadow as for problem-solving negotiation versus adversarial negotiation, being the first one the model according to which the parties resolve the problem by seeking together what they cannot do alone, in other words, agreements will be more effective when parties conceive of their purposes as solving the problem or planning the transaction, rather than winning or gaining unilateral advantage. They face the second one when apply the belief that one party gains while the other must lose.<sup>45</sup> We believe problem-solving negotiation must always apply, since the main aim is that both parties gain by resolving the problem.

Roger Fisher, who has been one of the greatest exponents of negotiation theories, considers that any method of negotiating may be fairly judged by three criteria: (i) it should produce a wise agreement if agreement is possible; (ii) it should be efficient; (iii) and, it should improve or at least not damage the relationship between the parties.<sup>46</sup> As we mentioned before, ADR need willingness of the parties, but in this ADR it is an essential element, without a hundred percent of willingness, negotiation is not possible. Taking positions serves some useful purposes in a negotiation. It tells the other side what you want and it can eventually produce the terms of an acceptance agreement.

Fisher mentions the following principles, regarding the selection of hard and soft positional bargaining, to be considered when negotiating: (i) arguing over positions produces unwise agreements; (ii) arguing over positions is inefficient; (iii) arguing over positions endangers an ongoing relationship; (iv) when there are many parties, positional bargaining is even worse; (v) being nice is no answer. As can be deducted, negotiation is an art. Negotiators must be gifted with the faculty to negotiate and if they do not how to negotiate, the result could be as dangerous as helpful.

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<sup>44</sup> "Settlement Agreement" or "Convenio de Finiquito".

<sup>45</sup> Menkel-Meadow, "Towards Another View of Legal Negotiation: The Structure of Problem Solving", *UCLA Law Review*, 31 *UCLA L. Rev.* 754, The Regents of the University of California, 1984.

<sup>46</sup> Roger Fisher and William Ury, "Getting to Yes, Negotiating an Agreement Without Giving In", With Bruce Patton, Editor, Second Edition by Fisher, Ury and Patton, Random House, Business Books, 1991, pp. 4.

Alternative to this positional bargaining, a method of negotiation has been developed at the Harvard Negotiation Project, with the purpose to produce wise outcomes efficiently and amicably. This method called “principled negotiation” or “negotiation on the merits” can be boiled down in four basic points that can be used under almost any circumstance. Each point deals with a basic element of negotiation, and suggests what one should do about it: (i) people: Separate the people from the problem; (ii) interests: focus on interests, not positions; (iii) options: generate a variety of possibilities before deciding what to do; (iv) criteria: insist that the result be based on some objective standards.<sup>47</sup>

We believe all these principles can be illustrated in the following practical example: Two kids are quarrelling for an orange. Their mother, with the only purpose to make them be quiet, takes a knife and divide the orange into two exact parties, giving one to each kid. However, the kids keep on arguing even after getting half of the orange. The mother is surprised and still wondering why the kids are not satisfied with what they just got. The reason is simple: one kid was looking for the orange skin and the other one was looking for the orange pulp. They did get half of the fruit but they did not get what they were expecting to receive. So in a good negotiation the parties need to know what each party wants in order to get a wise agreement, efficiently and amicably.

As there are not a third party involved, the role of the lawyers are very important, as Menkel-Meadow mentions the personalities of the negotiations (usually the lawyers) is one of the major issues raised by legal negotiations, the other one is the problem of unequal power.

Negotiation, although the most recommendable ADR, sometimes it is impossible to carry out and then arises the necessity to use another or others ADR in which different people, from those who made contract, take part in the resolution of the dispute. Unfortunately

<sup>47</sup> This method, including its principles, is easily explained in the following table:

PROBLEM		SOLUTION
Positional Bargaining: Which Game should you play?		Change the Game- Negotiate on the Merits.
<b>SOFT</b>	<b>HARD</b>	<b>PRINCIPLED</b>
Participants are friends.	Participants are adversaries.	Participants are problems-solvers
The goal is agreement.	The goal is victory.	The goal is a wise outcome reached efficiently and amicably.
Make concessions to cultivate the relationship.	Demand concessions as a condition of the relationship.	Separate the people from the problems.
Be soft on the people and the problem.	Be hard on the people and the problem.	Be soft on the people, hard on the problem.
Trust others.	Distrust others.	Proceed independent of trust.
Change your position easily.	Dig in to your position.	Focus on interest, not positions.
Make offers.	Make threats.	Explore interests.
Disclose your bottom line.	Mislead as to your bottom line.	Avoid having a bottom line.
Accept one-sided losses to reach agreement.	Demand one-sided gains as the price of agreement.	Invent options for mutual gain.
Search for the single answer: the one they will accept.	Search for the single answer: the one you will accept.	Develop multiple options to choose from; decide later.
Insist on agreement.	Insist on your position.	Insist on using objective criteria.
Try to avoid a contest of will.	Try to win a contest of will.	Try to reach a result based on standards independent of will.
Yield to pressure.	Apply pressure.	Reason and be open to reasons; yield to principle, not pressure.

there are some people that are against negotiation or settlement, who suffer, as Menkel-Meadow says, from “litigation romanticism”.<sup>48</sup>

#### 2.1.4.2. Conciliation.

Conciliation is an ADR process whereby the parties to a dispute agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. The conciliator does this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. In other words, the conciliator is an impartial person who tries to individualize the optimal solution and assists the parties by driving their negotiations and directing them towards a satisfactory agreement. This ADR involves building a positive relationship between the parties of dispute. Conciliation is a method employed in civil law countries<sup>49</sup> more than in Common Law.

Mediation and Conciliation are concepts sometimes used as synonyms.<sup>50</sup> However, there are important differences between them: (i) As for the role of the third. In conciliation the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement, he/she tries to seek concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes the parties’ needs, takes feelings into account and reframes representations; (ii) As for the role of the parties. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. In mediation the parties play an active role in the process, identifying interests, suggesting possible solutions, and making decisions concerning proposals made by other parties; (iii) As for the role of the attorneys. In conciliation, the role of the attorneys is also different. They generally offer advice and guidance to clients about proposals made by conciliators. In mediation, attorneys are more active in generating and developing innovative solutions for settlement; (iv) As for the timing. Conciliation is used almost preventively, as soon as a dispute or misunderstanding surfaces: a conciliator pushes to stop a substantial conflict from developing. Mediation is closer to arbitration in the respect that it “intervenes” in a substantial dispute that has already surfaced and that is very difficult to resolve without “professional” assistance. Mediation may be used, however, any time after the emergence of a dispute, including the early stages; (v) As for the proceeding. In conciliation, the conciliator may not follow a structured process, instead administering the conciliation process as a traditional

<sup>48</sup> Menkel-Meadow, Carrie, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 Cornell, L. Rev. 1159, 1995.

<sup>49</sup> Like Italy, where it is a more common concept than is mediation. While conciliation is typically employed in labor and consumer disputes, Italian judges encourage conciliation in every type of dispute. Sgubini, Alessandra, Frieditis, Mara and Marighetto, Andrea, Op.cit. footnote No. 24.

<sup>50</sup> There are some authors that consider that these two concepts are treated differently in different parts of the world. For example Justice M. Jagannadha Rao, who considers that the position in India, UK and under the UNCITRAL model is that conciliation “is a process in which the Conciliator plays a proactive role to bring about a settlement” and mediator is “a more passive process”. However, in the USA, the person having the pro-active role is called a ‘mediator’ rather than a ‘conciliator’. These terms are elsewhere often used interchangeably. Justice M. Jagannadha Rao, “Concepts of Conciliation and Mediation and their Differences”, [http://lawcommissionofindia.nic.in/adr\\_conf/concepts%20med%20Rao%201.pdf](http://lawcommissionofindia.nic.in/adr_conf/concepts%20med%20Rao%201.pdf).

negotiation, which may take different forms depending on the case. In mediation, the mediator controls the process through different and specific stages: introduction, joint session, caucus, and agreement, while the parties control the outcome; (vi) As for the solution. In conciliation, the parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In mediation, the mediator at all times maintains his or her neutrality and impartiality, he does not assume sole responsibility for generating solutions.<sup>51</sup>

### **2.1.4.3. Mediation.**

Mediation is a non-judicial method where an impartial third party, named mediator, participates in the solution of the controversy, by clarifying diverse controversial issues and proposing a solution by means of an opinion that lacks in all sense of mandatory nature for the parties.<sup>52</sup>

In addition, the mediator participates as a communication channel between the parties, avoiding direct contact between them.<sup>53</sup> The power of the third impartial must be born from the agreement between the parties, which can occur from the moment of the contract making or after it. Although, it could be possible to say that the agreement in a contract in this respect before the controversy arises would not be practical because the will to use this mechanism must subsist from the sprouting of the controversy to the fulfilment of the decision that ends the same, since any party can, at any time, reject it unilaterally. The mediator is generally a technician in the matter, with the possibility of having a single person or an associated group formed by several people.<sup>54</sup>

Mediation is a very appropriate method for disputes arisen in mayor projects where several parties and several contracts are involved. A court process could be disastrous and carry out the delay or the total suspension of the project. What it is required in these cases is rapidness.

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<sup>51</sup> Sgubini, Alessandra, Prieditis, Mara and Marighetto, Andrea, Op.cit. footnote No. 24.

<sup>52</sup> The following is a definition of mediation we have found complete and very useful, rendered by the Law Society of New South of Wales: "A voluntary process in which a mediator independent of the disputants, facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issue in the dispute, to develop options for their resolution and reach an agreement which accommodates the interests and needs of all disputants." Mediation Information Kid, the Law Society of New South of Wales, 1995.

<sup>53</sup> In some countries, like USA and Australia, there is an ADR called "Co-mediation" which is a process in which the parties to a dispute, with the assistance of two dispute resolution practitioners (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. ACDC, (Australian Commercial Dispute Centre), "Definition of ADR Processes", <https://www.acdcld.com.au/what-is-adr/definitions-of-adr-processes>.

<sup>54</sup> As in arbitration, if a group of people is chosen, an odd number is recommendable, being three the perfect case.



It is necessary to indicate that several institutions have written up rules that regulate diverse procedures of mediation as it is the case of the UNCITRAL, the ICSIC and the ICC.<sup>55</sup>

The difference between this mechanism and the previous ones, is that sometimes the parties are good businessmen and have the best intention to end the problem, but they are not well informed about certain issues that could have influenced the controversy, reason why they need the impartial intervention of a third and independent party who has broader knowledge. This third person will be in charge of explaining, in a detailed way, the situation; and the most important thing is that he/she sees the controversy from an angle totally objective and out of it, without having any interest that the situation be solved in certain sense.

This method is also highly recommendable, but it is essential to have always in mind that the third party will render a non-mandatory opinion. This opinion will establish who is the party who, in his/her opinion, has failed to fulfil correctly the contract. Sometimes it is difficult for the losing party to accept that opposite opinion and the consequences.

Mediation may be used to secure “business solutions to business disputes,” because it encourages the parties to consider all the dimensions of a dispute, including both legal issues and business interests.<sup>56</sup>

There is not a general rule stating that a mediator should have a specific career, and nowadays we face the situation that in aspiring to become a mediator, lawyers are already competing with a number of other professional groups (accountants, family therapists, social workers, surveyors). Our opinion is that even though there is not a rule that a mediator has to belong to a legal profession, legal knowledge should be required. It has been suggested that a legal mediator should be chosen from lawyers with at least seven years’ post qualifications experience.<sup>57</sup>

Mediation has been the object of different legislations around the world, thus the USA and Europe have developed modern legislations that allow parties in a contract to agree on mediation with the legal security that the process has got enough legal support. In Latin America, some national congresses have done their task in the same direction, as it is the case of Argentina<sup>58</sup>, Costa Rica<sup>59</sup> and Mexico.<sup>60</sup>

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<sup>55</sup> ICC - International Chamber of Commerce

<sup>56</sup> Sgubini, Alessandra, Prieditis, Mara and Marighetto, Andrea, Op.cit. footnote No. 24.

<sup>57</sup> Report of the Committee on Alternative Dispute Resolution, General Council of the Bar, October 1991.

<sup>58</sup> The Argentine law gives a mandatory character to the mediation previous to any court proceeding. The mediation procedure will promote the direct communication between the parties for the extrajudicial solution of the controversy and establishes some matters in which the mediation is not applied, as it is the case of the penal causes and generally those matters that are not able to be submitted to arbitration. The law establishes a mediation procedure that must be taken before a mediator chosen by drawing; for such effect a Registry of Mediators was created that is responsibility of the Argentine Ministry of Justice. The mediators, who receive a fixed amount, must have a law degree and get certain qualification. In case mediation is not successful the parties are able to take the case before the competent authority. Mediation and Conciliation Law, Law No.

#### **2.1.4.4. Mini-Trial.**

Invented in the Common Law System, it is a mechanism highly used by companies in the United States of America. Sander and Goldberg mention that this ADR consists of an abbreviated, adjudication-like presentation of evidence and arguments to a neutral joined by high-level principals of each side, which is then followed by negotiation between the principals.<sup>61</sup> Although there are many ways to carry out this mechanism, the common denominator is the following: a hearing is held before a panel formed by one third neutral party and a top level representative of each company, who will not have to be involved in the dispute. This ADR will be ruled by the procedural rules that the parties themselves decide. Each party presents its arguments orally and, as a general rule, Discovery<sup>62</sup> is avoided; it means, it is arduously limited the number of document that can be presented, as well as the time-limits of the procedure. The third neutral renders, generally, a legal opinion in order to inform the parties how it would be a sentence if they went to litigation before a court or arbitration, so that the panel can find a right solution.

#### **2.1.4.5. Summary Jury Trial.**

This is a new form of alternative dispute resolution, increasingly being used in civil disputes in the United States.<sup>63</sup> Few authors consider this ADR in their work, Sander and

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24.573, dated on 4 of October of 1995, published in the Government Bulletin on 27 of October of 1995, in the Republic of Argentina.

<sup>59</sup> The Costa Rican law regulates both mediation and arbitration in the same legislative body. Chapter II “Of the Conciliation or Mediation” makes the difference between the judicial conciliation and judicial mediation and the extrajudicial ones, granting total freedom to the parties to choose the person who will act as conciliator or mediator. Just as in the English legislation, the Costa Rican settles down the lawyers’ obligation who advise the parties in a conflict, to inform his clients on the possibility of resorting to alternative mechanisms to resolve disputes, such as mediation, conciliation or arbitration. Alternative Conflicts Resolution and Social Peace Promotion Law, Law No. 7727, published in the Newspaper, Official Journal on 14 of January of 1998, in the Republic of Costa Rica.

<sup>60</sup> Fraction XIII of the Commercial Code foresees “the mediation operations in mercantile businesses”. This provision does not have to be confused since this rule talks about mediators as intermediaries between two businessmen and not as people who look for the resolution of commercial conflicts. It is important the mention of Law for the Dialogue, Conciliation and Worthy Peace that, although does not talk about commercial aspects, recognizes the mediation like a pacific method for the resolution of controversies. Law for the Dialogue, Conciliation and Worthy Peace, published in the Federal Official Journal on 11 of march of 1995, in Mexico.

<sup>61</sup> Goldberg, S, Sander, F, Op.cit. footnote No. 36, pp. 51.

<sup>62</sup> See *infra* pp. 174.

<sup>63</sup> McMurdy and Rosenblatt consider that “although not as well known as other alternative dispute resolution mechanisms, the summary jury trial may be just as effective, if not more effective, in bringing closure to complex or highly contentious employment cases. Moreover, unlike mediation or arbitration, a summary jury trial does so by turning the biggest unknown - a juror’s reaction to the employer’s defense - into a highly effective case valuation and settlement tool.” McMurdy, Keith R. and Rosenblatt Grotta, Keith J., “The Summary Jury Trial: An Alternative To The Traditional Alternative Dispute Resolution Process”, Glassman & Hoffman, P.C., The Metropolitan Corporate Counsel, Published: May 01, 2005, available at <http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=May&artYear=2005&EntryNo=2895>.



Goldberg<sup>64</sup> mention this ADR, which basically is a Mini Trial with the characteristic that the presentation of the arguments is made to a mock jury.<sup>65</sup> A summary jury trial is a non-binding mechanism where a jury is selected and presented with the evidence that would be used at a real trial. The parties are required to attend the proceeding and hear the verdict that the jury brings in. After the jury verdict, the parties are required to once again attempt a settlement before going to a real trial.

Mitchell and Smith<sup>66</sup> established some important guidelines for the preparation and the structuring of a summary jury trial. According to this, before a summary jury trial, the attorneys and the referral judge draw up a stipulated order setting guidelines and time limits.<sup>67</sup> The order also allows the parties to set time limits on opening statements, witness testimony, and closing statements. One to two weeks before the proceedings, the parties submit proposed jury instructions and verdict forms. The parties should also submit exhibits, specifying which exhibits are stipulated to and which are contested. Parties may choose to prepare exhibit notebooks for each juror in order to save the time spent passing exhibits between jurors. While the evidentiary rules will likely be more relaxed at the summary jury trial, parties may make the same objections they can make at a normal trial. On the day of the summary jury trial, the attorneys will participate in the jury selection process. A six to eight member jury is ideal. To ensure that the verdict is authentic, the jury is not told that the decision is non-binding until after they have reached a verdict. After the jury is sworn in, each side will have the opportunity to present a brief (usually ten to fifteen minutes) opening statement. Time limits should be strictly enforced to keep the proceedings moving. The remainder of the trial will unfold as agreed to in the stipulated order. After the judge gives the jury the streamlined instructions, the jury should be given at least an hour to deliberate. To maintain the cost savings and convenience of the proceedings, it is important that the deliberations not spill over to another day. If the stipulated order requires a unanimous verdict, it may be prudent to agree to a consensus verdict instead. Once the jury has reached a verdict, the court may explain the nature of the proceedings and encourage the jurors to talk to the attorneys about the case presentation and the deliberations.

According to McMurdy and Rosenblatt's opinion, while some cases truly may be impossible to settle, the summary jury trial should be considered as a viable alternative to simply taking the case to trial. Used properly, it can provide both parties with an accurate impression of how an actual jury might feel about the case. This unique factor might be

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<sup>64</sup> Goldberg, S, Sander, F, Op.cit. footnote No. 36, pp. 51.

<sup>65</sup> A mock jury is a group of people assembled to hear a legal case and respond to it, in a "trial" which does not have legal ramifications. Mock juries are used in legal education and legal research to create a trial-like setting for learning which does not involve the actual legal system. The trial may have varying degrees of realism, ranging from being held in a courtroom with a real judge to being conducted informally in a classroom with a student acting as the judge.<http://www.wisegeek.com/what-is-a-mock-jury.htm>.

<sup>66</sup> Mitchell, Dionna K. and Smith, Leslie C., "When Mediation Fails: The Summary Jury Trial Alternative", available at <http://www.nmbar.org>.

<sup>67</sup> These guidelines may include provisions that specify: (i) what evidence the parties may offer (usually any evidence that would be admissible at trial); (ii) the number of witnesses who may be called to testify for each side; and (iii) whether the jury's decision is binding or advisory.

just the thing needed to bring the parties to resolution where traditional mediation fails. And it may end up saving some money in the process.<sup>68</sup>

#### **2.1.4.6. Conciliation-Arbitration.**

It consists of two procedures without existing a separation between both; it means, a conciliation followed by an arbitration process.<sup>69</sup> By means of this mechanism, the parties canalize the dispute to an independent person, generally a qualified lawyer, who will try to conciliate both parties in certain time. In case of not obtaining an adequate agreement, within certain period of time, the third party involved will render a decision. Up to here essential difference with conciliation would not exist; but if the parties do not accept it voluntarily, the losing party will be able to solicit that the solution be analyzed within an arbitration process.

The characteristic aspect of this ADR is that the parties agree that, if the losing party does not obtain a better decision by submitting the controversy to arbitration, the costs of the conciliation and any later procedure will be paid by that party. The parties must agree in a percentage, generally a 25%, which will be the limit to be able to determine whether the arbitration procedure was worthy and whether the losing party should pay the expenses.<sup>70</sup>

Another characteristic is that the conciliator becomes an arbitrator or a member of the arbitral tribunal, once the losing party has not accepted his/her decision voluntarily. The second part of the procedure represents a greater degree of difficulty for the party that loses in the conciliatory phase, since this party will have to try to modify the opinion of the conciliator acting now as an arbitrator or member of the arbitral tribunal. The only way to obtain this, is by submitting new evidence or a deeper analysis of those already submitted during the conciliation process or by a different argumentation from that used in the conciliation process.

This ADR could be confused with a simple conciliation followed by an arbitration procedure; nevertheless, we must take into account that, in this case, we are in the presence of the same person who acts as both, conciliator and arbitrator, and, in the case of two

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<sup>68</sup> McMurdy, Keith R. and Rosenblatt Grotta, Keith J., Op.cit. footnote No. 63.

<sup>69</sup> Due to the flexibility and adaptability of ADR, there are some considered as “combined or hybrid dispute resolution processes” which are processes in which the dispute resolution practitioner plays multiple roles. For example, in conciliation and in conferencing, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. ACDC, (Australian Commercial Dispute Centre), Op.cit. footnote No. 53.

<sup>70</sup> For example, if the outcome of the conciliation is that the losing party is to pay the other party a total amount of USD\$1,000,000.00, that party should try to get an award, in case he/she decide to go for the arbitration process, with a condemn of \$750,000.00 or less. If he/she does not decide to go for the arbitration process, or if goes and get such an award, the conciliation and arbitration fees are generally split it into two equal parties. Otherwise, if he/she does not get such an award, it means a sentence lower than \$750,000.00, all the fees are to be paid by the losing party.

separated procedures, it generally exists the prohibition in the applicable arbitration rules, of not being able to act as conciliator and arbitrator in the same controversy.<sup>71</sup>

The idea of this ADR, in our opinion, was to try to give greater legal security and in some extend, binding nature to the decision of a simple conciliator, although this procedure has not been much successful, either for lack of publicity or for the traditional idea of not presenting a dispute twice before the same person, first as conciliator and later as arbitrator, because it is thought that a fair decision could not be reached.

Tang Houzhi, considers that the idea of combining arbitration with other ADR procedures exists and is expanding. But to realize the idea, there is a rather long way to go. ADR has so many forms. He considers there are two major concerns about the combination of arbitration with conciliation: Natural Justice; and the same person acting as mediator/conciliator and arbitrator. On the other hand the combination of arbitration with conciliation has, according to Houzhi, many advantages which are: saving one separate conciliation procedure; less expensive; higher success rate of conciliation; and enforcement outcome.<sup>72</sup>

#### **2.1.4.7. Mediation-Arbitration.**

As mentioned before, mediation is a very appropriate method for disputes where both parties are willing to settle a dispute and comply with the outcome voluntarily. On the other hand, arbitration is so far an unlimited-advantage process through which the parties are obliged by the decision of the arbitral tribunal. In other words, individually, the success of arbitration and mediation cannot be questioned. However, there are some projects as those mayor projects where several parties and several contracts are involved, where it is difficult to find out the willingness of the parties to voluntarily comply with the opinion of the mediator and where individual arbitration or court process could be

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<sup>71</sup> Bernardo Cremades mentions that traditionally, it was an agreed doctrine within the world of arbitration that an arbitrator's duty shall not be mixed with any mediating activity or intend to reconcile. This was one of the greatest dangers widely highlighted in arbitration seminars as it was stated outright that an arbitrator who initiated conciliation or mediation was exposed to the risk of an eventual challenge. According with this doctrine the first question which arises, is knowing whether a person who has acted as mediator or conciliator may later intervene as arbitrator in the same conflict and among the same parties. The general rejection which this proposition enjoyed some years ago is today questioned even by the most reticent. Another question rests in knowing whether, in the middle of an arbitration proceeding, the parties may consent to the arbitral tribunal undertaking the functions of a conciliator or mediator. Until very recently, the rejection of this arbitration doctrine was generalized. Today the answer to this question depends on the will of the parties. Cremades, M. Bernardo, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration"; "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 153.

<sup>72</sup> Houzhi, Tang, Is there an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?, International Dispute Resolution: Towards an International Arbitration Culture. International Council for Commercial Arbitration, International Bureau of the Permanent Court of Arbitration, the Hague, pp. 108.

disastrous and carry out the delay or the total suspension of the project.<sup>73</sup> What it is required in these cases is rapidness. So, can there be a successful combination of these individual processes into one alternative dispute resolution mechanism? Based on some authors' experience, as Richard P. Flake, the Mediation-Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.<sup>74</sup>

Mediation-Arbitration<sup>75</sup> can be a successful alternative dispute resolution mechanism which can efficiently resolve a dispute with potential for saving significant preparation costs. It is basically developed as the already mentioned Concilio-Arbitration but in this case the characteristics of the mediation must be considered and there is not a percentage limit as there is in Concilio-Arbitrations. It allows the parties the chance to resolve the dispute on their own terms. The general rule is that the mediation process be performed before the arbitration one, and that the second one will be used in case the parties are not willing to comply with the mediator's opinion. However, due to the flexibility that characterizes ADR, and if the parties agree to do so, there is no limit to adapt this ADR to the needs of the parties. An example of this would be to agree on an arbitration process and parallel on a mediation one. In this case, the mediation process would be shorter, less expensive and simpler.<sup>76</sup> Mediation-Arbitration combines some of the best of the different attributes of mediation and arbitration. However, it should only be undertaken after a thorough understanding of the nuances of the process by both parties and the neutral.

#### **2.1.4.8. Rent-a-Judge.**

Also born in the Common Law System, in this method, the parties ask a retired judge to take care of the decision. The third party involved is not longer invested with the authority that he/she used to have while being a representative of the judicial power. Therefore,

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<sup>73</sup> In the common law system, this type of agreements has established precedents so that the courts grant support to the parties, by recognizing and enforcing them. Thus, in the case of Channel Tunnel Group Limited v. Balfour Beatty Construction Limited and others (1993) 2 WLR 262, HL, where claimant was Channel Tunnel Group Limited, who had hired the defendant, an English and French consortium, to build the famous "eurotunnel". In the contract, a two stages procedure was settled down, first mediation before a panel of experts and later on arbitration before the ICC. The defendant threatened to stop the work and the plaintiff asked for an injunction to an English court to avoid that the defendant fulfilled its threat. The case was finally heard by the Supreme Court that maintained that English courts must be able to grant this injunction, giving support to a pre-arbitration mechanism in international commercial contract. Other two famous cases where the use of these mechanisms with two stages can be seen are: (i) The Boston Central Artery/Tunnel Project, "Alternative Dispute Resolution at Boston's Central Artery/Tunnel Project", Anthony Battelle, Chief Legal Counsel, Massachusetts Highways Department and (ii) The Hong Kong Airport Core Programme, Colin Wall, "Hong Kong's Airport Core Programme Dispute Resolution Procedure (1992) 58 JCI Arb 237.

<sup>74</sup> Flake, Richard P. "The Med/Arb Process: A View From The Neutral's Perspective", ADR Currents, The Newsletter of Dispute Resolution Law and Practice: June 1998 Edition, American Arbitration Association, 1998, p.2

<sup>75</sup> It is also considered as "combined or hybrid dispute resolution processes" which are processes in which the dispute resolution practitioner plays multiple roles. ACDC, (Australian Commercial Dispute Centre), Op.cit. footnote No. 53.

<sup>76</sup> Particularly, this ADR will be analyzed when considering the settlement of disputes in PEMEX.

his/her decision lacks of binding nature, but his/her experience makes it a trial in essence but totally informal.<sup>77</sup>

Amazingly, there is a Rent-a-Judge industry<sup>78</sup> in some countries like the United States of America, where services are provided in order to cut through all unnecessary bureaucratic procedures and to eliminate all unnecessary legal wrangling. The services are divided into several steps to be carried out. The steps are the minimum ones to frame a dispute and resolve it. The steps are: (i) sing up of the parties, who usually split the cost of the service; (ii) file of the pleadings; (iii) file of the evidence; (iv) file any objections to the opponent's evidence; (v) file the trial briefs; (vi) the in-person-hearing; (vii) receive the written opinion.

According to Redfern and Hunter, this ADR has been developed in California, New York and certain other States. The position is regulated by legislation. They mention that the retired judge presides over an informal process and delivers a judgement which can be enforced by the courts.<sup>79</sup>

#### **2.1.4.9. Pre-Trial Conference.**

With its origin in 1990, and unfortunately abolished in 1996,<sup>80</sup> at the New South Wales District Court which is an intermediate trial court in the Australian Court hierarchy and it has been treated as a model court for reforms to the legal system of China. This ADR was a meeting held at the court before a trial, or before an arbitration hearing. The purpose of such a meeting was to settle the claim, or at least to narrow the issues, with the assistance of a third party, namely a Registrar of the court, who took a proactive role in helping the parties to settle, but did not evaluate the claim. The meeting was generally attended only by the attorneys not by the parties, since the court's opinion was that "it can be counter-productive to have clients in the room as practitioners do not negotiate as feely, which may reduce the potential to settle."<sup>81</sup> Claims that did not settle at a pre-trial conference were assigned to an arbitration or trial.<sup>82</sup>

#### **2.1.4.10. Neutral Evaluation or Early Neutral Evaluation.**

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<sup>77</sup> In accordance with Alan Redfern and Martin Hunter, in California, New York and other States of the United States of America, this ADR is regulated by the legislation, according to which the parties should ask a court to designate the retired judge, who drafts a judgement that can be fulfilled by the own courts. Redfern, Alan and Hunter Martin, "Law and Practice of International Commercial Arbitration", Sweet and Maxwell, Second Edition, pp. 32.

<sup>78</sup> See [www.Rentajudge.com](http://www.Rentajudge.com).

<sup>79</sup> Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 32.

<sup>80</sup> These conferences began unsupervised in that court in 1980 and were supervised by a court registrar from 1990. Abolished in 1996, we did not find any registry that they are still applied.

<sup>81</sup> Delaney, Marie, "Plaintiffs' perceptions of procedures: Perceptions of trial, arbitration and pre-trial conference in the New Wales District Court and private mediation", Civil Issues No. 5, Justice Research Centre, 1994.

<sup>82</sup> Delaney, Marie and Wright, Ted, "Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-Trial Conference and Mediation", Justice Research Centre, 1997.

“Neutral evaluation”, also known as “early neutral evaluation,” or “ENE”, and sometimes simply called “case evaluation”, is an ADR mentioned only by few authors, amongst them are Sander and Goldberg, and Blackman. This mechanism consists of a brief presentation to an experience neutral, typically a volunteer attorney selected by the court, leading to an assessment of the case by the neutral. This ADR typically takes place early in the case.<sup>83</sup>

Blackman says that “neutral evaluation is a comparatively new kid on the ADR block”. He also considers that this ADR is often good in complicated cases, for example, where there are difficult mixed issues of fact and law, gray-area damages issues, or difficult evidentiary issues, and so on. Oil & Gas projects will be a good target for this ADR since a skilled neutral evaluator can sit the participants down, walk them through the problems of the case, and tear the veils from their eyes step-by-step.<sup>84</sup>

#### **2.1.4.11. Executive Tribunal.**

This is an ADR with shades of mini-trials where lawyers are presenting themselves in a neutral consultancy role. Here the legal teams of the respective parties present their cases to the parties themselves, sitting together with a neutral adviser, with the objective of enabling them (in case of corporations, senior executives) to assess the strengths, weaknesses and prospects of the case, and then have an opportunity to enter into settlement discussions on a realistic, business-like basis. Executive tribunals can take place at any stage in a case. Some disputants prefer to wait until after the pleadings have closed, but the procedure can be followed at a very early stage of the dispute to maximize cost savings.

The neutral adviser is seen as a key figure in the process, assisting the parties to question the lawyers, explaining aspects of the case to them and, if required, giving an opinion on the case. The neutral adviser may be any person with authority in the field of the dispute, but is typically a neutral lawyer or retired judge. Although the neutral adviser is presented by proponents of this procedure as the central figure, it is a drama in which the respective legal teams play a major role. They conceive the performance, propose it to their clients, and ultimately present it to them. This is a collaborative exercise through which the lawyers, alongside the neutral adviser, are subtly transformed into caring neutrals who tactfully reveal to their clients the folly of the ultimate step into the judicial domain. So there is a dual transformation of the lawyer toward neutrality, as a neutral adviser and as a presenter of a drama, the self-conscious objective of which is to coax the clients to settlement. Once the neutral adviser has acted as a consultant while the drama is being presented, he may then adopt a facilitative or mediating role in any settlement discussions which follow.<sup>85</sup>

<sup>83</sup> Goldberg, S, Sander, F, Op.cit. footnote No. 36, pp. 51.

<sup>84</sup> Blackman, John S, “Neutral Evaluation -An ADR Technique Whose Time Has Come”, available at <http://library.findlaw.com/1999/Sep/1/128447.html>.

<sup>85</sup> Roberts, Simon, “Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship”, The Modern Law Review, Volume 56, Blackwell Publishers, 1993, England.



Even though this ADR would seem to be only useful for low-cost disputes, the truth is that even in disputes between multinationals, clients get so involved and stressed that they will not give way despite his lawyer advice.

#### **2.1.4.12. ADR Court Assistance.**

Well known in the Common Law System, this mechanism has operated satisfactorily in the United States, Australia, New Zealand and China. It consists of the designation of a lawyer with ample experience in the subject by the court, in an initial stage of a judicial procedure, in order to analyze the case and expresses to the parties his/her opinion on the sense of the possible resolution. If the parties decide to accept the decision they will have saved money and time and they will have the idea that they resolved the conflict in a friendly way and not with a lawsuit in judicial court, feeling that they will not have when finalizing the litigation. We think that this mechanism is a logical and practical way to support the judicial courts.

Sander and others have long been arguing for the integration of alternative dispute resolution processes into the public justice system in the United States of America.<sup>86</sup> Another founding country of ADR, Britain has been much more wary of involvement in negotiation.<sup>87</sup> This is what was created by Sander as the “Multi-door Courthouse”, which consists in having available many mechanisms to the parties directly in court. As if it were a restaurant where the parties, by selecting from a menu, could determine the appropriate method for resolving their dispute.

#### **2.1.4.13. ODR.<sup>88</sup>**

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<sup>86</sup> Sander, F.E.A., “Alternative Dispute Resolution in the United States: An Overview in Justice for a Generation”, Papers of the 1985 London Meeting of the American Bar Association, St. Paul, Minn: West Publishing Company, 1985, p.260.

<sup>87</sup> Roberts, Simon, Op.cit. footnote No. 85.

<sup>88</sup> We found some other ADR, which are briefly mentioned here, since we do not consider are of great transcendence in our research: (i) Expert appraisal is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved; (ii) Expert Determination is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination; (iii) Facilitated Negotiation is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation; (iv) Facilitation is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be resolved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation; (v) Independent Expert Recommendation involves the expert’s recommendation for a settlement (as in Expert Appraisal). If one party does not comply, that party may be required to pay costs in

ODR, Acronym for Online Dispute Resolution, has shown the evolution of ADR in parallel to the technology. As the name itself suggests, this ADR has got the characteristic of being administrated thru the internet. According to Stipanowich's opinion, the internet affords extraordinary opportunities for resolving disputes over long distance efficiently and at minimal cost, it is only a matter of time before the new electronic media revolutionize our approaches to resolving disputes, along with most other aspects of modern life. He also considers that ODR is still in its infancy, but will come to the fore as new generations of lawyers and potential users accustom themselves to performing all kind of tasks online. Ultimately, the concept of interaction in a virtual reality will likely transform many of our concepts of negotiating and adjudication, and even our notions of "in court" and "out of court."<sup>89</sup>

#### **2.1.4.14. The "Philadelphia" Arbitration.**

This is a scheme operated in the USA (at a District Court level) since 1990. It is so called because it is adapted from an arbitration scheme operating in the American city of the same name. The ADR consist on the fact that all civil actions filed in the Court of Common Pleas of Philadelphia County with an amount in controversy of \$50,000.00 or less, excluding equitable actions and claims to real estate, must first proceed to a compulsory arbitration hearing before a panel of three attorneys who have been court certified to serve as arbitrators.<sup>90</sup> With more than 20,000 cases a year concluded at the arbitration level, the Compulsory Arbitration Program in Philadelphia County is one of the most successful programs of its kind in the nation. It is strongly advised that all counsel who practice at the

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the event of subsequent arbitration or litigation; (vi) Multi-party mediation is a mediation process, which involves several parties or groups of parties; (vii) PDR (Primary Dispute Resolution) is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The Family Law Act 1975 (Cth) 'encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made' (section 14). The Federal Magistrates Act 1999 defines primary dispute resolution processes as 'procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation' (section 21). ACDC, (Australian Commercial Dispute Centre), Op.cit. footnote No. 53.

<sup>89</sup> Stipanowich, Thomas, ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution", *Journal of Empirical Legal Studies*, Volume 1, Issue 3, 843-912, November 2004, pp. 897.

<sup>90</sup> As of January 1, 1999, the Notary in Philadelphia will also stamp the initial summons or complaint with the following language: "This matter will be heard by a board of arbitrators at the time, date, and place specified but, if one or more parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial de novo from a decision entered by a judge." Philadelphia Civil Rule 1303(a)(1), as amended November 19, 1998, effective January 1, 1999.



Arbitration Centre become thoroughly familiar with the arbitration practice and procedure<sup>91</sup> so that the arbitration process will run smoothly.<sup>92</sup>

#### **2.1.4.15. Arbitration.**

This is an adversarial process relying on a third party, who is named arbitrator and who decides the outcome of the claim. It is an adjudicative process. Arbitration is not considered as an ADR for all the authors. In our case, arbitration is included as an ADR. In fact, as the most used and regulated ADR. Arbitration has been the object of invaluable research, and many books and articles have been written around the world about it. But it should be recognized that the last 20 years are essential in the development of such an ADR. The institution of arbitration is based in a set of principles named as “the Golden Rules” by Ogarrio<sup>93</sup>. These rules are: (i) to treat equally both parties, (ii) to give each party the right opportunity to present his/her case. We consider there are other important principles in arbitration, which are the “free willing party principle”<sup>94</sup> and “pacta sunt servanda”.<sup>95</sup>

##### **2.1.4.15.1. Different Kinds of Arbitration.**

##### **2.1.4.15.1.1. Equity Arbitration and Law Arbitration.**

Equity Arbitration, as it was first known this legal institution, is the type of arbitration that resolves the controversy under the principle of “*ex aequo et bono*”, which means “what is equitable, is good”. The purpose of this arbitration is to resolve according to consciousness, good faith and truth known of the third party who is deciding the case. The third party involved is well-known as “*amiable compositeur*”, acting generally by

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<sup>91</sup> Compulsory Arbitration in the First Judicial District is controlled by the arbitration rules of the Pennsylvania Rules of Civil Procedure and the Philadelphia Civil Rules. Except as provided in those rules, the normal procedural and evidentiary rules control.

<sup>92</sup> Civil Administration At A Glance 2005-2006, Compulsory Arbitration Centre. 1880 Jfk Boulevard, 5th Floor. (<http://courts.phila.gov/pdf/manuals/civil-trial/compulsory-arbitration-center.pdf>).

<sup>93</sup> Alejandro Ogarrio has been arbitrator at Pemex arbitrations and is a Member of the Mexican Academy of International Private and Comparative Law; Alternate Representative of Mexico before the United Nations Commission.

<sup>94</sup> This principle is a concept from the Kantian philosophy which is referred to the ability of the individual to dictate their own moral standards. The concept is now a basic principle in private law. That part of the need that the legal system empowers individuals to establish legal relations according to their free will. The individuals themselves dictate their own rules to regulate private relationships.

<sup>95</sup> Pacta sunt servanda (Latin for “agreements must be kept”), is a brocard, a basic principle of civil law and of international law. In its most common sense, the principle refers to private contracts, stressing that contained clauses are law between the parties, and implies that non-fulfillment of respective obligations is a breach of the pact. The general principle of correct behavior in commercial practice, including the assumption of good faith, is a requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some systems even without any direct penalty incurred by any of the parties. With reference to international agreements, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Pacta sunt servanda is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform.

him/herself, since it is difficult to match two or more different consciousness. The award through which the solution is presented, is known as “consciousness award”.<sup>96</sup>

Nowadays this kind of arbitration is hardly used; it could be used when the business involved is of low economic value. It can be considered as a different method from the arbitration to resolve controversies, understanding this last one as the modern conception of the institution.

Law Arbitration, also known as “strict iure”, occurs when the arbitrators must resolve the controversy strictly adjusting to the rules of law. This kind of arbitration is broadly used at present, since it doubtlessly brings major legal security to the parties.

#### **2.1.4.15.1.2. Public Law Arbitration and Private Law Arbitration.**

Public Law Arbitration is the settlement of conflicts between States, with subjection to international law, by arbitrators designated by the interested governments. These third parties are committed to allocate the award that fall as a definitive solution of the conflicted matter.<sup>97</sup> In other words, it is the arbitration that is carried out between sovereign States.<sup>98</sup> In these cases, the State is granted with “iure imperiis”, that is what distinguishes it to the individuals.

This kind of arbitration had much use in older time, mainly to resolve conflicts regarding territorial limits, and in most of the cases recognized and well respected personalities were appointed as arbitrators, such as popes, presidents or eminent professors. At present, Public Law Arbitrations are used in controversies of interpretation and application of bilateral or multilateral treaties,<sup>99</sup> since territorial conflicts are hardly seen.

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<sup>96</sup> In comparison law, we found that the people who resolve these controversies are known in different forms, thus in Italy they are called “irrituales”, in South America they are called “arbitradores” and in other parts they are known as “amiable compositeur” or “mediator”.

<sup>97</sup> De Pina Vara, Rafael, “Diccionario de Derecho”, Editorial Porrúa, S.A. México, 1988, p. 98.

<sup>98</sup> Nevertheless, arbitrations of public character, due to the strong political load they can imply, have contributed sometimes to spread distrust with respect to the institution of arbitration. The internationalist doctrine spread in Latin America, well-known as “Calvo Doctrine”, according to which foreigners resign to the protection of their governments, has its origin, in some extend, in the distrust towards public arbitration, understood as “diplomatic protection”. Siqueiros, José Luis, “Arbitration in Latin American Countries. Perspective from México”, conference at “The National Institute of the American Bar Association”, on the 5-6 November 1987, Miami, USA.

<sup>99</sup> We find diverse mechanisms of conflict resolutions in these international treaties, which common denominator is to look for the solution by diplomatic channels and sometimes going to conciliation mechanisms and, in case of not obtaining a solution, arbitration is then used. In the text of treaties it is anticipated, generally, the creation of supranational bodies, mixed commissions, international panels and consultative agencies that serve to resolve the controversies. The analysis of these mechanisms of solution of controversies, where arbitration is included, deserve their own research, but to the effect of the present paper, will be only mentioned some international instruments that demonstrate great evolution in the use of these methods of international conflict resolution: (i) Civil Aviation the International Agreement. Open for signature in Chicago 1944. “Ratified and signed treaties by Mexico, Senate of the Republic, v. IX, 1972, p. 281, article 84. This Agreement foresees the celebration of Complementary Agreements between the party States, being one between the Mexican United States and the United Kingdom (Federal Official Journal of

The controversies of the States are mainly resolved by diplomatic channels, and in case of failing, the States go basically before two institutions; (i) The Permanent Court of Arbitration (also known as Permanent Tribunal of Arbitration), and; (ii) The International Court of Justice.<sup>100</sup> When the case is not taken to the first to be resolved by means of arbitration, the litigation will be of the knowledge of the Court that is the main judicial organ of the United Nations.

Private Law arbitration is developed between subjects or organizations of private law; it means, between individuals. It is important to mention that the State (including its state own companies), by virtue of the theory of the double personality, can take part in this type of relations as long as it does it with its quality of “iure gestionis”, which means, like another individual. In these cases, the State acts without its quality of sovereign, being able to make any type of contracts and being committed always in the same conditions as the individuals. The State own companies, known in Latin America as “Paraestatal Public Administration” is generally the one that acts with this quality, reason why private arbitration is considered.<sup>101</sup> Private Law Arbitration is more used at present than Public Law Arbitration.

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Mexico, 31 May 1989, p.3); (ii) International Telecommunications Treaty. Adopted in Nairobi, Kenya on the 6 November 1982, “Treaties, Mexico Senate, Volume XXIV, p. 655, Federal Official Journal of Mexico, 29 June 1984. Articles 59 and 82; (iii) United Nations Convention on the Law of the Sea. Done in Montego Bay, Jamaica, 10 December 1982. “Treaties, Mexico Senate”, Volume XXIV, p. 419. Section 5, articles 186, 187, 188 and follows; (iv) Agreement that creates the International Monetary Fund. “Basic Documents of International Economic Law”, CCH International. Chicago, 1990, p. 321; (v) Agreement that contains the Constitution of the International Labour Organism. “Treaties, Mexico Senate”, Volume IV, p. 439. This document comprises the part XIII of the Treaty of Peace between the Allied and Associated Powers and Germany, signed in Versailles on 28 June 1919; (vi) International treaties on Sugar, Cacao, Rubber and Coffee. “Treaties, Mexico Senate”, International treaty on Sugar (Geneva 1977). Volume XXII, p. 311; International treaty on Cacao (Geneva 1980), Volume XXIII, p. 719; International treaty on Rubber (Geneva 1979), Volume XXIII, p. 309; International treaty on Coffee (New York, 1983), Volume XXV, p. 5; (vii) Agreement Regarding the International Commerce of Textiles. “Treaties, Mexico Senate”, Volume XX, p. 555; (viii) GATT.; (ix) NAFTA; (x) Economic Complementing Agreement between Mexico and Chile, and; (xi) ALALC, ALADI, CARICOM, MERCOSUR, Andean Common market.

<sup>100</sup> The original statute of the conventions by means of which these courts were established, only foreseen arbitration between party States, being able the court to extend its jurisdiction to non-signatory States. Nevertheless, by resolution adopted in 1960, the Board of Directors, extended the scope of this jurisdiction to include the solution of controversies between State and non-governmental organizations, such as private companies, adopting a set of Rules on Arbitration and Conciliation for this purposes. In 1981 the arbitrations on reciprocal claims between the United States and Iran began and, in 1989 the arbitration between the United States and the United Kingdom on the charge of services in the Heathrow airport, all of them realised according to the mentioned in article 47 the Convention of 1907. Before these two cases the Hague Court had resolved 25 cases, from 1902 to 1970.

<sup>101</sup> Julio C. Treviño thinks in this respect, that when one of the parties is private and the other is a State or a public organization, the arbitration can continue considering itself like private and that the parties can agree a type of arbitration which rules respect the governmental function of one of the parties, with the formula of an ad-hoc arbitration. It is also possible agree on an arbitration conducted before an institutions that specializes in this type of cases, as the Permanent Court of Arbitration, that accepts to know commercial cases when one of the parties has governmental function, or the CIADI. Treviño, Julio C., “El Arbitraje Comercial Internacional: Un Recurso para América Latina”, *Revista de Investigaciones Jurídicas*, Escuela Libre de Derecho, año 12, Número 12, México, 1988, p. 327.

#### **2.1.4.15.1.3. National Arbitration and International Arbitration.**

National Arbitration occurs when all the elements that constitute the conflict, such as the object of the arbitration, the parties, the applicable substantive law, etc, belong to a same country; which means, the problematic is framed within a unique legal system. It is difficult to establish a totally noticeable line to know how to differentiate between a national to an international arbitration, since we must analyze the specific case to know if we are against one or against the other.

International Arbitration occurs when, on the contrary, one or more of the elements of the conflict are related to two or more countries. In other words, when a foreign element exists; it means, when any connection with another legislation different from the domestic arises.<sup>102</sup>

#### **2.1.4.15.1.4. Commercial Arbitration, Civil Arbitration and Mixed Arbitration.**

Commercial Arbitration is used when we are in the presence of a commercial act. Most of the cases, the commercial concept could be summed in a single word: “profit”; it means, whenever there is a purpose of profit in the operations between the individuals, we could assume that we are in the presence of a matter that could be subject to commercial arbitration. Once again, the Model Law gives us the solution.<sup>103</sup>

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<sup>102</sup> On the matter, it is convenient to mention what article 1o. of the Model Law, created by the UNCITRAL in 1985, establishes. “Article 1o. Scope of application:

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.” Available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).

<sup>103</sup> Article 1o. (footnote included) of the Model Law created by the UNCITRAL in 1985, establishes. “Article 1o. Scope of application:

(1) This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States.

\*\* The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance;

Civil Arbitration, by simple exclusion, can be said that is that one that is not commercial; it means, that does not have direct relation with commercial traffic or it is not governed by mercantile orderings.

Mixed Arbitration is the one in which for one of the parties the act has commercial nature and for the other civil nature. If this problem is analyzed from an international point of view, can be argued that the essence of the international commercial law is that this law tries to regulate the greater number of operations, and this is confirmed by what it is established in the Model Law of the UNCITRAL.

It is of extreme importance to determine what type of matter we are dealing with, since from this depends the applicable legal regulation to be applied.

#### **2.1.4.15.1.5. Conventional-Origin Arbitration and Legal-Origin Arbitration.**

Conventional-Origin Arbitration occurs when the parties by common agreement decide to use this mechanism to resolve their controversy. The agreement might be expressed before or after the conflict arises. These types of arbitrations represent the autonomy of the will of the parties in its maximum expression.

In international public law, this type of arbitration generated the creation of bilateral agreements on arbitration at the beginning of the last century, to be applied in matters derived from a treaty or any controversy that will be able to arise between the parties. In the international private law, it generated the creation of “the arbitral agreement”, concept that we will cover later.<sup>104</sup>

Legal-Origin Arbitration, also known as official arbitration, occurs when certain legislation invites the parties to go to arbitration to resolve the conflict arisen between them, existing by all means the possibility of not accepting this invitation and going directly to the judicial process.

#### **2.1.4.15.1.6. Institutional Arbitration and Ad-Hoc Arbitration.**

Institutional Arbitration is that one that is administered by an arbitral institution, which generally uses its own set of procedural rules previously issued. Although some institutions accept the administration under a set of rules different from those elaborated by them. It is also possible to speak of semi-administered arbitrations, because the majority of the institutions, within the variety of their services, consider the possibility of providing services regarding some stages in the procedure, as it would be the case of the appointment of the arbitrators, the organization of hearings, the designation of experts, amongst others;

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exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.”

<sup>104</sup> See infra pp. 56, 200 and 207.

nevertheless, from our point of view, in these case we would be in the presence of an ad-hoc arbitration and not of an institutional one.

Ad-hoc Arbitration is that one lead without the intervention of an arbitral institution that administers the procedure. The arbitral tribunal, which can be a sole arbitrator, is in charge of the total and direct administration, although there are some cases, as it has been mentioned already, where support can be asked to some arbitral institution in certain stages of the procedure. This fact does not turn the arbitration into an Institutional Arbitration.

The procedural rules utilized in the solution of the conflict, can be totally created by the parties or they can adopt some rules previously issued by an arbitration body, or a combination of the two possibilities before mentioned. The clearest example of a set of rules issued by a body is the Facultative Rules of the UNCITRAL, which is the basic instrument adopted by the United Nations, and seems to be the most compatible instrument with the different existing legal systems in the world. It is recommendable that the parties adopt rules already created by some institution, since writing up a new set of rules for an specific case, could represent a great amount of money spent and lost time, but the most important thing, to run an unnecessary risk.

Finally, it is necessary to know in what occasions one should go towards an institutional arbitration and in which towards and Ad-hoc arbitration. In that respect, we must highlight that the election is not easy. In an ideal world, the election should be made once the controversy appeared; nevertheless, in this case the parties should try to adopt the path that more personal benefits represent to them, without looking for the fairest solution. In order to be able to select the type of arbitration is the advisable one, the nature of the subject should be taken into account, observing diverse aspects, such as: what kind of arbitral tribunal is required, what procedure should be followed, the expertise of the institution, the available monetary resources for paying the arbitration expenses, amongst others.

Hope H. Camp, Jr. affirms that the main difference between an Ad-hoc Arbitration and an Institutional one, is like the difference between a tailor-made suit and one bought at a store, he also considers that Ad-hoc arbitration is preferable in the majority of the cases, when disputes between Mexican and North American businessmen are involved. In his experience those relations are long and very personal.<sup>105</sup>

We believe that a fundamental element to be able to choose between one and the other, is the analysis if the involved company is a small or medium size company, in which case, ad-hoc arbitration is recommended, since the institutional one turns to be more expensive. At the same time, if we are in the presence of a conflict whose parties are companies that belong to the macro industry, or if the subject in dispute is very complex, or it deals with great amounts of money, then we must go to the institutional arbitration.

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<sup>105</sup> Hope H. Camp, Jr., "Binding Arbitration: A Preferred Alternative for Resolution Commercial Disputes Between Mexican and U.S. Businessmen", St. Mary's University School of Law, 1991, p. 8.



#### **2.1.4.15.1.7. Bilateral Arbitration and Multilateral Arbitration.**

In the Bilateral Arbitration, as its name indicates, two parties in the conflict take part. It is important to mention that each party can be formed by several independent parties, either individuals or companies, independently of the fact that they be part of a partnership or simply because they have the same interests in the solution of the conflict.

In the Multilateral Arbitration, on the contrary, there are more than two parties and perhaps, more than two controversies. Many situations exist that can fit in these hypotheses.<sup>106</sup>

The benefit of accumulating several controversies when looking for the solution would be, mainly, to avoid incoherent decisions, possibility that can happen when related controversies to each other are object of separate arbitrations. Another advantage is the saving of time and money (v.gr. when pertinent evidence and argumentations in more than one controversy are examined, only once, for all the controversies).

The practice has demonstrated that the situations where several parties take part in the arbitration can lead to certain complications in the procedure, reason why expertise and carefulness must be taken into consideration. The problems can appear since the drafting of the arbitration clause, going through all the development of the arbitration procedure, till the recognition and enforcement of the arbitral award. As other subjects, multilateral arbitration deserves an independent research; nevertheless, our intention is to make clear that the international community has been working in the legal regulation of this type of arbitration and that in the future, the procedures where two or more parties are involved will be definitely increased.<sup>107</sup>

#### **2.1.4.15.1.8. Regular-Track Arbitration and Fast-Track Arbitration.**

<sup>106</sup> The UNCITRAL established that “There are many situations that may give rise to a dispute involving more than two parties and possible also more than two disputes. The following situations are some of the many examples of the notion of multi-party arbitration:

(i) A case in which a single arbitration is to decide more than one dispute between different pairs of parties. For example, in a construction contract, one arbitration may be established to decide two disputes arising from the same construction defect, one between the purchaser and the contractor and another one between the purchaser and the architect; in another example, the sale of goods by A to B and the resale of those goods to C may give rise to a single arbitration to decide the dispute between A and B and the dispute between B and C, both disputes arising from the same defect in the goods;

(ii) Arbitration in which the dispute is between parties A and B, but where a third party C, who has an interest in the outcome of the dispute, is allowed to join the proceeding in order to submit evidence and make statements. Such a situation may arise, for example, in an arbitration between purchaser A and seller B because of defects in the goods, in which case the responsibility of party C (who sold the goods to party B) may depend on whether the arbitral tribunal finds the goods to be defective. Such cases are sometimes referred to as “joinder”, “impleader” or “intervention”.

(iii) A multilateral contract (e.g. a joint venture or consortium) may give rise to a dispute in which on each side one or more parties to the contract are involved. See, UNICTRAL “Guideline for pre-hearing conferences in Arbitral Proceeding”, Twenty-sixth session, Vienna, 1993. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V93/852/42/IMG/V9385242.pdf?OpenElement>.

<sup>107</sup> For further information on multilateral or multy-parties arbitrations, see Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 184.

This is a classification made according to the time-limits established in the proceeding. Regular-Track Arbitration is the procedure where speedy and time bound resolution of the dispute is not essential. The terms in which every step of the procedure should be performed are the “normal” ones, without giving special attention to short periods.

Fast-Track Arbitration, on the contrary, is a time-bound arbitration. Fast track arbitration can be adopted for the resolution of international as well as national disputes. Many international and national institutions engaged in providing arbitration facilities have promulgated fast track arbitration rules. These rules provide, in detail, the fast track arbitration procedure. Ad-hoc arbitrations can also be perfectly adjusted to be fast-track. Generally, subject to the agreement between the parties, the fast track arbitral tribunal consists of sole arbitrator. The essence of the fast track arbitration is that the time limit is fixed for every action to be taken by the parties or the arbitrators. The parties are not permitted or allowed to seek extension of time or postponement of any matter by the arbitral tribunal.<sup>108</sup>

Out of the advantages or pros of the Fast-Track Arbitration we find: (i) saving time, money and grace; (ii) focus on the real issues in dispute; (iii) reduced effects on operational, business and financial resources of the parties; (iv) smaller reputational losses; (v) fewer conflicts of interest for arbitrators; (vi) overall efficiency; (vii) client satisfaction.

The decision to use a Regular-Track Arbitration or a Fast-Track Arbitration is not easy again, some factors need to be taken into consideration, amongst which the amount of the dispute, the nature of the parties, the object of the disputes, can be mentioned. Some authors consider that even in the most factually complex cases, fast-track arbitration is possible.<sup>109</sup> However, the simple concept of rapidness is very transcendental to this effect, since culturally, this varies from town to town. What is fast in Latin-America is very slow in England. Even amongst arbitral institutions the limit periods are different, as Andreeva certainly catalogues the magic number six (six months) is differently used in diverse set of rules which prove that the concept of speed is relative<sup>110</sup>.

#### **2.1.4.15.2. The Arbitration Agreement.**

<sup>108</sup> Agarwal, Vinod K, “Alternative Dispute Resolution Methods”, On-line Resources Centre, UNITAR, available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document14/Agarwal/3fast.htm](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document14/Agarwal/3fast.htm).

<sup>109</sup> Mirèze, Philippe, “Are Specific Fast-Track Arbitration Rules Necessary?”, available at: <http://www.arbitralwomen.org/files/publication/0105202718125.PDF>

<sup>110</sup> Institutional Thinking: The Magic Number Six. Arbitration rules prove that the meaning of speed is relative: (i) ICC regular-track rules, Art. 24: The award must be rendered within six months from the terms of reference. (ii) DIS fast-track rules, Sec. 1.2: The proceedings cannot exceed six months from the statement of claim, or nine months in case of a three-member tribunal. (iii) SCC regular-track rules, Art. 37: The award must be rendered within six months from the transmission of the case to the arbitrator. (iv) Swiss fast-track rules, Art. 42(1): The award must be rendered within six months from the transmission of the file to the tribunal. (vi) CIETAC regular-track rules, Art. 42(1): The award must be rendered within six months from the composition of the tribunal. (v) CPR draft fast-track rules: The award must be rendered within six month from the commencement of the arbitration. Andreeva, Yulia, “The Pros and Cons of Fast-Track Arbitration”, Debevoise & Plimpton LLP, Presentation, Geneva, Switzerland, 10 October 2008. Available at: [http://www.arbitration-ch.org/below-40/pdf/FastTrackArbitration\\_Andreeva.pdf](http://www.arbitration-ch.org/below-40/pdf/FastTrackArbitration_Andreeva.pdf).



The arbitration agreement is the base that supports the structure of the institution of arbitration. It is an agreement in all the extension of the word. This agreement is the instrument through which the parties express their will to resolve the controversy using this universally well-known and recommendable method.

International legislation and domestic law of most of the countries that take an important place at the international commercial arbitration game, recognize that the arbitration agreement must count on three basic requirements: (i) that be in writing; (ii) that the matter of the conflict be susceptible of arbitration<sup>111</sup> and; (iii) that the agreement must be valid and enforceable, as it must be the award that ends the procedure.<sup>112</sup> In order to determine the validity of such an agreement, the capacity of the parties must be analyzed as well as the fact that it is not against principles of public order.<sup>113</sup>

Two are the important effects if the arbitration agreement that are worth mentioning:

1. Judges who receive a case where the parties have signed this agreement will have to stay the proceeding without having competition to hear it.<sup>114</sup> Judges will only have competition if the arbitration agreement is declared nonexistent or void.<sup>115</sup> The procedural stage to ask for the nonexistence or invalidity of the arbitration agreement is when answering the request for arbitration - if it is asked before the arbitral tribunal - or at anytime - if it is asked before the competent judge-, as long as it is not concluded that such a party has accepted the arbitration procedure.

2. The arbitration agreement forces the parties to resolve the controversy by means of arbitration, in accordance with the terms of such an agreement. They can not, unilaterally, change neither this effect, nor any other (*pacta sunt servanda*). To this respect, our opinion is that in some countries like those in Latin America, perhaps for lack of knowledge on the field, the parties sometimes do not give the importance to this effect, although it is an obvious effect for those who are familiar with the institution. Indeed, in many occasions some attorneys, for not having direct contact with this method or any other ADR, do worry about the negotiation of all the clauses of the contract, but of the arbitration agreement.

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<sup>111</sup> There is whole theory on the arbitrability of the conflicts. As this research does not intend to cover such a topic, at least for the cases different from Oil & Gas, we will only mention that as a general rule, arbitration is allowed as long as the parties are able to negotiate the issues without affecting other people. In agreement with Refern and Hunter, the problem is complicated by the fact that there are at least three different national systems of law may be involved in the decision as to whether or not a particular dispute is arbitrable (and they may not necessarily reach the same conclusion). The question may fall to be determine first, under the law governing the arbitration agreement; secondly, under the law of the place of arbitration; and, thirdly, under the law (or laws) of the country (or countries) of enforcement. Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 146.

<sup>112</sup> See NY Convention infra footnote No. 120.

<sup>113</sup> There is also a whole theory of Public Order.

<sup>114</sup> Stay a proceeding is a concept known in the Common Law System, as for the Civil Law system the concept would be “desistirse”.

<sup>115</sup> Domestic applicable law must be analyzed to confirm the agreement has fulfilled the legal requirements.

Sometimes they do not worry to even consider arbitration or any other ADR and instead they prefer to use the traditional method, as the well known Latin-American saying reads: “it is better bad but well-known than good for knowing”.<sup>116</sup> Definitely this idea must change as rapidly as possible.

The fundamental characteristic of arbitration is its consensual nature. It is born from the will of the parties, which must be expressed to have effectiveness. This expression, in accordance with several authors, among them Humberto Briseño Sierra,<sup>117</sup> can occur of several forms. In other words, the arbitration agreement can appear in the following modalities:

#### **2.1.4.15.2.1. Arbitration Clause.**

The Arbitration Clause is agreed before the controversy arises. It is also known as “prophylactic arbitration”.<sup>118</sup> It expresses the will of the parties to put under arbitration the future controversies that can arise from the contract in which the mentioned clause is included.

#### **2.1.4.15.2.2. Submission Agreement.**

The Submission Agreement is the agreement made by the parties once the controversy between themselves has arisen; it means, it is an agreement that begins by indicating which is the controversy which solution will be object of the arbitration as well as by the determination of the parties involved. Generally, it is an agreement of wills as the previous one but is formulated in a more detailed way.

#### **2.1.4.15.2.3. Arbitration Covenant.**

The Arbitration Covenant, is recognized by few authors, amongst them Briseño Sierra,<sup>119</sup> who identifies it as that agreement subsequent to the sprouting of the problem object of the arbitration, but unlikely to the Submission Agreement, it is made by a different means, such as a simple exchange of letters, telegrams, telex or inclusively facsimile or any other similar means. The Arbitration Covenant arises from international treaties, as it is the case of article II of the New York Convention.<sup>120</sup>

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<sup>116</sup> In Spanish the saying would go: “más vale un mal acuerdo que un buen pleito..!!”

<sup>117</sup> Briseño Sierra, Humberto, “El Arbitraje Comercial Doctrina y Legislación”, Textos Universitarios Departamento de Derecho, UIA, Editorial Limusa, S.A. de C.V., Mexico, 1988, pp. 27.

<sup>118</sup> In some Spanish speakers countries it is also known as “Cláusula Compromisoria”.

<sup>119</sup> Briseño Sierra, Humberto, Op.cit. footnote No. 117, pp. 28.

<sup>120</sup> Article II.

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Although the article indicated above does not consider other means by which the arbitration agreement can be carried out, as it is the case of the facsimile and the electronic mail interchange (e-mail)<sup>121</sup>, we do not have to interpret its exclusion, because it should be remembered that this Convention was subscribed in the year of 1958. On the other hand, the Model Law on International Commercial Arbitration, created by the UNCITRAL, establishes in its article 7, the way in which the parties in an agreement can express their will to use arbitration.<sup>122</sup>

The arbitration agreement has total autonomy. It means, if the invalidity of the contract (object of the controversy) were declared, that would not affect the validity of the arbitration agreement. Also, if the invalidity of the arbitration agreement is declared, that would not affect the validity of the contract made by and between the parties.

Frederic Eisemann considers that the arbitration clause must not be complicated neither long. The clearer and shorter the greater effectiveness it will denote. Ambiguity is the worst enemy, and this might turn into cost of time and money.<sup>123</sup> We totally agree with Eisemann's opinion. There is the necessity to create a clause that is adapted to the specific case and that it is as clear as possible, being more important clarity than eloquence.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

<sup>121</sup> We did not find any regulation regarding the treatment should be given to agreements done by means of interchange of electronic mails (e-mail) in civil law countries. In common law countries it seems that the situation is not clear, in the sense of considering as an "instant" mean of communication and contradictory arguments can exist. For the interchange of telex and fax, see the case: Entores Ltd. V. Miles Far East Corp'n (1955) 2Q.B. 327; (1955) 3 W.L.R. 48; (1955) 2 All E.R. 493; (1955) 1 Lloyd's Rep. 511 (C.A.)

<sup>122</sup> Article 7. Definitions and forms of arbitration agreement.

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

<sup>123</sup> Frédéric Eisemann, who is a former General Secretary of the Arbitration Court of the CCI, named this kind of clauses as "Pathological Clauses". These clauses can be found at the CCI. Eisemann, Frédéric, "The Court of Arbitration: Outline of its Changes from Insertion to the Present Day", "60 Years of ICC Arbitration, a Look at the Future", ICC Publishing S.A., Paris, 1984, p. 391.

Nevertheless, we consider that we must take into account the type of arbitration we want to deal with, because if we are in the presence of an institutional arbitration, is possible that the clause be short and complete, but if we are before an ad-hoc arbitration, the clause must generally include further aspects and, therefore, it is almost impossible it be brief.

Our opinion is that in order to obtain an effective clause, we must observe the following elements and include them into the text: (i) to chose between institutional and ad-hoc arbitration (institutional arbitration is generally agreed); (ii) if institutional arbitration is chosen, to use the model clause of such institution; (iii) to select the place or venue of the arbitration; (iv) to chose the language or languages to be used; (v) to determine the applicable substantive law;<sup>124</sup> (vi) to determine the applicable adjective law (in case of ad-hoc arbitration); and, in any case, agree otherwise in respect to a provision contend in the arbitration rules; (vii) to agree any requirement or limitation regarding the expertise of the arbitrators; (viii) in any case, the form the arbitrators will be appointed and the faculty they will be granted, amongst others matters.

#### **2.1.4.15.3. The Arbitral Tribunal.**

The first question in showing up when dealing with the subject of the arbitral tribunal is to know who are the people that are able to act as arbitrators. The answer is simple: all that people who have sufficient legal faculty and certain grade of expertise in a determined field. It is highly recommendable that they have experience in the arbitration field. Nevertheless, and taking into account that in some countries, such as those in Latin America, where professionals are in the process of incorporation to this ADR methods, this requirement must not be considered essential.<sup>125</sup> Any professional or technician can participate as an arbitrator, as long as he/she fulfils the profile looked for by the parties or by the arbitral institution.

The arbitral tribunal can be integrated by a single person or by several people and, as it is the case, advantages and disadvantages appear. Most of the authors refer the organ that

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<sup>124</sup> As for the determination of the substantive law, Stephen R. Bond proposes three important considerations so that the parties draft correctly the clause of applicable substantive law: (i) That the chosen legal system is sufficiently complete and developed with respect to the problem arisen between the parties or to those problems that can regularly arise; (ii) If it is not wanted to select what law must be applicable to the case, which is not recommendable, can be said only what legislation or legislations are not wanted to be applicable; (iii) To be sure that the selected legislation considers the matter of the conflict as possible of being resolved by arbitration, since there are some matters that are not suitable to be resolved by using arbitration. Bond, Stephen R., "How to Draft an Arbitration Clause", General Secretary of the ICC, Beijing, 1988.

<sup>125</sup> Alan Redfern and Martin Hunter think that probably the most important qualification for an international arbitrator is that he/she has experience in the applicable law and in the practice of arbitration. Nevertheless, they recognize that a process must exist by which potential international arbitrator acquire the necessary abilities, thus a new generation of arbitrators must come, which must be recognized by countries and by arbitral institutions. Redfern, Alan and Hunter Martin, *Op.cit.* footnote No. 77, pp. 219. We agree with this idea, that is to say, that a new generation of arbitrators must be prepared; nevertheless, in case of some countries like Mexico, the arbitration cases are monopolized for a small group of lawyers, who do not let new ones to get practical experience in the field.

resolves the controversy as “arbitral tribunal”, including such expression to a sole arbitrator or an associated organ integrated by two or more people.

#### **2.1.4.15.3.1. The Role of the Arbitrator.**

Socially, the concept of “role” is very important. The concept of social role is referred to the actions that are due to be carried out to an individual when he/she is in certain situation. The expectations of the others are a consequence of the behaviour rules that delimit the role’s content.<sup>126</sup> In those cases where the concept is connected to law, the concept turns to be a socio legal role, as it is the case of judges, attorneys-at-law, law makers, legislators, head of the government, and of course arbitrators and mediators.<sup>127</sup> The role of the arbitrator is transcendental. For sociology there are only individuals, as Weber says, the social action is an action conducted by individuals. The individual is the social cell who is member of a social group as well. Within this social group the individuals have diverse roles depending diverse factors. Amongst these factors we can find his profession, familiar situation, etc., as well as the situation in which they are situated. Arbitrators have got a specific role addressed to resolve a conflict.<sup>128</sup>

Lon Fuller strongly believed that arbitrators should never try to mediate. There would be a confusion of roles and clarity of roles. Delimitation of roles is necessary for that process’ integrity, and for the legitimacy of whatever outcome might be reached.<sup>129</sup>

There is an important difference between the acting of an arbitrator in a national case from an international one. In an international case the arbitrator must analyze and resolve the conflict with a criterion that put aside his/her national experience. This should include the fact of avoiding any favouritism towards a party with whom the arbitrator shares ethnic, cultural, social and religious roots, as well as to try to understand the subject as a lawyer belonging to such a system.

At the beginning of the arbitration or mediation processes and even before formulating the corresponding claim, the parties in the conflict are naturally concerned as to the selection of the arbitrators and mediators. In the case of arbitration, due to the mandatory character of the decision, the decision must be deeply thought. This stage constitutes a fundamental factor, since the proceeding will be determined by the arbitrator.

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<sup>126</sup> It comes from the word “role” in Theater.

<sup>127</sup> The concept of Role is applied to both, individuals and companies or entities, which is a creation of law, throughout which it gives personality to a group of people. However, the science of sociology considers very strange this concept, as a group of people. To sociology there are not “persons” as a group of people, but only as individuals, as Weber says, the social action can only be performed by an individual. Thus, individuals form groups, which are known, from the sociology point of view as a “human collective”. An example of these human collectives are the LLC (Limited Liability Corporations) or the S.A. (Societades Anónimas), well known in every legal system in the world. Law foresees both actions, that of the individuals as well as of the human collective or social group. Robles, Gregorio, *Op.cit*, footnote No. 5, pp. 82–83, 130-137.

<sup>128</sup> For further information on role, status and group, see. Ferrari, Vincenzo, “Diritto e Società, Elementi di sociologia del Diritto”, Editori Laterza, Settima Edizione, Italia, 2008, pp. 130-150.

<sup>129</sup> Menkel-Meadow, Carrie, *Op.cit*. footnote No. 16, pp. 19.

Mr. Bernardo Cremades considers that it is not the same to have an arbitral tribunal chairman or member who is an engineer or a jurist; or who comes from the common law or from the Continent; or who speaks well or passably well the language in which the arbitration proceeding is going to be conducted; or who is familiar or not with the normal practices of the professional sector in which the parties carry out their activities.<sup>130</sup>

The arbitrator has to be bilingual y bicultural. Thus the truly international arbitrator is one who is immediately able to distinguish what is purely local from that which is outside his own national frontiers and within a globalised economy.

The arbitrator's cultural origin should be irrelevant in his decision-making process. Bernardo Cremades considers that, in his/her decisions, the arbitrator and the mediator should not be conditioned by either his/her geographical origin or his/her education, his/her race, his/her religion or even personal sympathies. Here, it lays the true professionalism of the international arbitrator who knows how to face the expectations of the parties, who have chosen him for his/her impartiality and neutrality.<sup>131</sup>

Another thing to be considered when talking about the role of the arbitrators is the possible cultural implications of the location selected for the arbitration procedure. In many countries, the success of arbitration was delayed until the time when local judges overcame a certain resistance to the competition posed by the arbitrator's activity. The fact that the 1958 New York Convention have been ratified by so many countries, has been a decisive contribution to the transformation of the judges' initial attitude towards arbitrators, from one of confrontation to one of true co-operation. Local judges have applied arbitrators' rules with the same diligence as they apply ordinary procedural legislation.<sup>132</sup>

#### **2.1.4.15.3.2. Independence and Impartiality.**

People who work as arbitrators have the obligation to act with independence and unquestionable impartiality. Independence is an objective criterion, an example of not counting on this independence would be the case of existing some familiar, labour or business bonds with one of the parties in the conflict. On the other hand, impartiality is a subjective criterion, which consists of the fundamental ethical obligation of the arbitrator in relation to certain subject, with the purpose to avoid an unbalanced position. Example of this would be to have books, articles or any written published material on the subject where it is clearly deduced that his/her position is in favour of one of the parties; or, the fact that the arbitrator acts in a warm way with one of the parties and in a discourteous way with the other.

<sup>130</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 165.

<sup>131</sup> Cremades, M. Bernardo, idem, pp. 165.

<sup>132</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 165.



Unquestionably, the first of the two characteristics before mentioned is easy to appreciate and therefore to regulate it. However, impartiality is a situation difficult to perceive and to evaluate, reason why it is necessary that the parties be accessible and act with flexibility. We will always find some sort of relations or circumstances that could be the base of a non-conformity, since in many cases the proposed arbitrators have been in contact with one or both parties of the case. On the contrary, the relation of a judge with the parties, before presenting the lawsuit, is generally non-existent, since the parties do not even know who will be the person in charge of resolving the case.

In order to avoid conflicts and to guarantee an independent and impartial performance, people who are proposed as arbitrators must follow three rules of great importance mentioned by Aguilar Alvarez:<sup>133</sup>

1. They must declare or reveal all the relations that could exist with the parties, their lawyers and any other person who takes part in the arbitration procedure.
2. They do not have to act as legal advisor of some of the parties. In many occasions the arbitrator is designated in common agreement, for being a well-known person for both parties. Perhaps he/she has rendered legal services to both parties, which could make them think that in the arbitration procedure the arbitrator will have to behave as their legal adviser. Nevertheless, the role of such a person must be totally different, since, by no reason he/she can advise the parties, and even less to advise one of them.
3. They must not be in contact with the parties unless it is in the presence of the arbitral tribunal. The arbitrator, much more if it is his/her first arbitrations to resolve, must have much careful in treating the parties with extreme equality and avoiding any contact with them, without reporting to the other party.

In case one of the parties notices the existence of some situation that might risk the obtaining of a fair award at the end of the procedure, independent of the fact that they arise before or during the procedure, the challenge of the arbitrator can be sought by using a previously established procedure. The majority of the institutional rules and domestic laws foresee when such a procedure must be carried out.

If the arbitrator does not reveal some situation that could be cause of a challenge, he/she could be sanctioned in several forms, in accordance with the applicable rules. The sanction varies considering the case but it can get at something as radical as the annulment of the award.

#### **2.1.4.15.3.3. Arbitrators vs. Judges.**

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<sup>133</sup> Guillermo Aguilar Alvarez served as Counsel and General Counsel of the ICC International Court of Arbitration and was subsequently principal legal counsel for the government of Mexico for the negotiation and implementation of the North American Free Trade Agreement (NAFTA).

Arbitrators are private people<sup>134</sup> away from the *litis*, without *imperium* and that count on the support of the applicable Law and of the judges. They are civil servants enrolled in the judicial mechanism, who provide justice in the name of the State counting on the *imperium* that the arbitrators lack.

Judges are part of one of the powers of the State - judicial power- whose essential work is the interpretation and application of the law, having the obligation to subject his/her acting to a pre-established procedure. Arbitrators, in opposition to which many can think, they do have jurisdiction, as it is known the faculty to say or to declare law.<sup>135</sup> In conclusion, the arbitrators do have jurisdiction but do not have *imperium* and the judges do have both jurisdiction and *imperium*. International arbitrators have always been closer, and thus more familiar with the usage and practices of international commercial trade than local judges. However, local judges are co-operating with arbitrators with an increasing international mentality.<sup>136</sup>

We share the idea of M. Sornarajah,<sup>137</sup> who maintains that we must recognize two types of jurisdictions within the arbitration procedure: the “primary jurisdiction” that is the one that we found in arbitrators as private people and the “secondary jurisdiction” that is sworn into judges as representatives of the free and sovereign States.

The jurisdiction of the judge has three essential characteristics: (i) it is permanent. The State must guarantee its permanence; (ii) it is mandatory. In principle it is the unique instance that is imposed to the parties; (iii) it is public. Any person can turn to it (still the incapable ones). In contrast, the jurisdiction of the arbitrator has the following characteristics: (i) it is temporary. When the award is rendered, the arbitrator loses its investiture; (ii) it is optional. It is linked only for the parties that subscribed the arbitration

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<sup>134</sup> In agreement with Jose Luis Siqueiros, there are three theories that explain the nature of the functions of the arbitral tribunal:

1. The Jurisdictional or Authoritarian Theory, according to which the judicial power delegates certain acting faculties to the arbitrators, but their decisions are subject to the revision of the judicial power.
2. The Privatist or Contractualist Theory, according to which the acting faculties of the arbitrators are born from the will agreement of the parties; it means, according to this theory arbitration is a contract.
3. The Eclectic Theory, which is conformed by the characteristics of the previous ones; it means, jurisdiction is granted to the arbitrators, but this one is originated by the will agreement of the parties.

We share the eclectic theory, since the arbitrators are not vested with the “*imperio*” faculty, as the judges do. This faculty talks about the coercive faculty to make the parties comply with their own decisions. But arbitrators count on jurisdiction (primary jurisdiction) which is definitively born from the agreement of the will of the parties.

<sup>135</sup> According to Eduardo Pallares, “the word jurisdiction, etymologically, means to say or to declare law. From the general point of view, jurisdiction makes reference to the power of the State to distribute justice throughout the courts in the subjects that arrive at their knowledge, but this concept is empirical and it does not penetrate to the bottom of the scientific problem.” The jurisdiction notion has brought about diverse doctrines, of which Pallares makes a good exhibition. Pallares, Eduardo, “Diccionario de Derecho Procesal Civil”, Editorial Porrúa, S.A., México, D.F. 1991, pp. 510 to 520

<sup>136</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 167.

<sup>137</sup> Professor of the Law Faculty at the National University of Singapore.



agreement; (iii) it is private. It only affects those that being capable decide to go to arbitration.

Both jurisdictions, although they do not come from the same ancestry, are linked and have a complementary role. Judges give support to arbitral tribunals. As commented by Bernardo Cremades, collaboration between judges and arbitrators in fact becomes indispensable, in some instances because judicial co-operation may be required to initiate the arbitration procedure. Quite frequently, judges must take provisional measures to guarantee the effectiveness of the arbitration proceeding.<sup>138</sup> Obviously, we must be in the presence of a competent judge according to the law of the territory where the arbitration procedure is developed.

Next, it will be mentioned the four most important stages where is necessary the intervention of a judge in the arbitration procedure.

(i) The constitution and re-constitution of the arbitral tribunal. When the parties have decided an ad-hoc arbitration or if the rules in an institutional arbitration do not grant this faculty to the institution (which would be rare, since they usually establish this faculty), and one of the parties refuses to appoint the sole arbitrator or a member of the arbitral tribunal, the other party can ask for the intervention of the judge to designate the arbitrator;<sup>139</sup>

(ii) Precautionary or Interim measures<sup>140</sup>. It is important to make the differentiation of the type of interim measure, since there are some that in practice do not require of the intervention of the judge (i.e. to order a party to do or not to do something). In these cases the arbitral tribunal “invites” the parties and any violation to this invitation will be taken into account when resolving the dispute. Often, interim measures must be issued according to the system where the goods are located and here the intervention of the judge is necessary (i.e. the arrest of a ship).

Within the most common interim measures, the following can be mentioned: (a) inspection on goods and merchandises; (b) sale of perishable articles; (c) orders to make effective guarantees and letters of credit; (d) orders for the continuation of the fulfilment of obligations of a contract; (e) deposit of money or goods; (f) precautionary embargoes; (h) orders to abstain to do something, and; (i) orders to remove shares to the market.

At international level, the interim measures are extremely important. We must emphasize the functionality of the famous “injunctions” known in the Common Law System, being

<sup>138</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 167.

<sup>139</sup> In some countries the arbitral legislation is so outpost, as it is the case of Hong Kong. In this legislation, it is foreseen that the HKIAC will be the designating authority. We believe this provision should be inserted in all the legislations that have an arbitral institution or centre, since the institution will have more experience to designate the suitable person than the own judge.

<sup>140</sup> The modern authors consider as precautionary measures, those that the law authorizes so that the holder of a subjective right assures its correct exercise when he/she lacks an executive title by means of which he/she can obtain the judicial immediate execution of such a right.

one of most used the “Mareva injunction”,<sup>141</sup> followed by the “antisuit injunction”<sup>142</sup> and “negative declarations”.<sup>143</sup>

(iii) The administration of evidence. Perhaps it is more common than in the previous cases, since in this case the intervention of a third away from the procedure, will be asked for, namely witness, who does not have any interest in comply with an “invitation” of the arbitral tribunal (i.e. the use of public force to bring witnesses and to successfully obtain other evinces).<sup>144</sup>

<sup>141</sup> Before 1975, it did not exist an available procedure in England. From that year the courts have developed a practice where the court grants an interlocutory order which purpose is to avoid the removal or wastefulness of goods of the defendant before the judgment is known. Lord Denning M.R. in two cases at the Court of Appeal, decided that such an order might be granted to be applied in a foreign defendant, as long as the English court has jurisdiction on the case. This order is world-wide well-known as “Mareva injunction”, which has had great application in countries like Canada, Australia and New Zealand. In 1981, statutory authority to this practice with section 37 (3) of the Supreme Court Act 1981 occurred, that confirms that the Mareva injunction might be granted no matter whether the defendant be domiciled, resident or present in the English jurisdiction. In order to be able to obtain a Mareva injunction, the plaintiff must demonstrate that: he/she has, at least, a good case in relation on the merits and that a real possibility exists that the judgement is issued in his/her favour and that it does not have any sense if the defendant removes the goods. In other words, this injunction operates “*in personam*” instead of “*in rem*”. In case there is an arbitral agreement according to which the conflict is resolved by an English arbitration, the granting of a Mareva injunction can be requested at the English court that has secondary jurisdiction. On the contrary, if the place of arbitration is outside England, it has been argued that the English court, based on the opinion of Lord Diplock (the Siskina) cannot grant a Mareva injunction, because this injunction can be only granted for cases that are actionable in England. See the cases: Nippon Yusen Kaisha v. Karageorgis (1975) 1 W.L.R. 1093 (C.A.), Mareva Company Naviera S.A. v. International Bulkcarriers, S.A. (1975) 2 Lloyd’s Rep. 509 (C.A.), The Siskina v. Distos Compañía Naviera, S.A. (1979) A.C. 210, 261, Derby & Co. Ltd. v. Weldom (1990) Ch 48 (C.A.), and Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd (1992) 2 W.L.R. 741 (C.A.).

<sup>142</sup> The English courts have discretionary power so that, under certain circumstances, grant an “injunction” restricting a plaintiff to initiate or to continue with a judicial procedure outside the English territory. The Antisuit injunction it operates “*in personam*” and if it is not fulfilled by the person to whom is addressed, he/she can be accused from contempt of court. In order to be able to grant this precautionary measure, the English court must have jurisdiction on this person, which occurs, amongst other things, when he/she is an English resident, or if he/she is part in an English court proceeding, or if he/she has sufficient connection with England that justifies the order, as it would be the case of having taken a legal action in another country that represents the breach of an arbitration agreement that foresees England as the place of the arbitration. See the cases: Castanho v. Brown and Root (UK) Ltd (1981) AC 557, (1981) 1 All ER 143, HI; Midland Bank plc. V. Laker Airways Ltd (1986) QB 689; Bank of Tokyo Ltd. V. Karoon (1987) AC 45 at 59, CA; Société Nationale Industrielle Aerospatiale v. Lee Kui Jak (1987) AC 871 at 892; Thomas (1983) Lloyd’s MCLQ 692.

<sup>143</sup> In accordance with the RSC Order 15, rule 16, the English courts can grant, to a person, an order by means of which his/her rights and obligations are declared or denied. Those declarations in negative sense are very few and the classic example is to declare that such person does not have responsibility with respect to a legal business. See the cases: Guaranty Trust Co. of NY v. Hannay & Co. (1915) 2 K.B. 536, at 564 per Pickford LJ (C.A.); Camilla Cotton Oil Co. v. Granadex S.A. (1976) 2 Lloyds Rep.10 (H.L.); Booker v. Bell (1989) 1 Lloyds Rep. 516.

<sup>144</sup> Unfortunately The Hague Convention on the taking of evidence abroad in civil or commercial matters, concluded on the 18 of March of 1970, is not applied to arbitrations. There is not a method to bring a witness who is outside the jurisdiction of the court of the place of the arbitration, to give a testimony. Nevertheless, some countries have legislations that allow arbitral tribunal based in other countries, to obtain witness evidence within their jurisdictions, either by request of the arbitral tribunal or by the interested party. An example of the previous mentioned is Sweden with the “Swedish Act of 1929”. On the other hand the Model

(iv) Recognition and enforceability of the arbitration award.<sup>145</sup>

#### 2.1.4.15.4. The Arbitral Procedure.

The arbitration process is born conventionally and it has changed in a parallel way to the cultural influence of towns and times. But in its base we find the unalterable directives of the procedures of good faith. Consequence of the previous thing, are the brief formulas of proceeding and procedural mechanics, as they are the orality, the immediacy and the logical sequence of the procedural stages.

The arbitration procedure initiates in *stricto sensus*, when the arbitral tribunal is formed and continues with a series of stages which end up with issuance of the arbitration award. In this process the parties can appear represented or advised. The arbitration processes count on flexibility, characteristic that allows the parties to adapt the needs of each case to this recommendable method. Generally speaking, it is possible to say that the indispensable stages within any arbitration process are: (i) the request for arbitration, in any case the claim;<sup>146</sup> (ii) the answer to the request for arbitration, in any case, the counterclaim;<sup>147</sup> (iii) the formation of the arbitral tribunal, including the appointment, acceptance and, in any case confirmation and challenge<sup>148</sup> of the members,<sup>149</sup> (iv) If agreed, a hearing previous to the arbitral activities; (v) submission of the claim in case it was not presented along with the request for arbitration; (vi) if so the case, submission of the counterclaim in case it was not presented along with the answer to the request for arbitration; (vii) the evidence stage -

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Law of the UNCITRAL also contemplates this possibility and is to hope that the countries that adopt this Model Law in their internal legislations do it with this provision. See art. 27.

<sup>145</sup> See infra pp. 75

<sup>146</sup> Art. 3 of the ICC Rules foresees that:

3. The Request shall, inter alia, contain the following information: (a) the name in full, description and address of each of the parties; (b) a description of the nature and circumstances of the dispute giving rise to the claim(s); (c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed; (d) the relevant agreements and, in particular, the arbitration agreement; (e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and (f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

<sup>147</sup> Art. 5 of the ICC Rules foresees that:

1. Within 30 days from the receipt of the Request from the Secretariat, the Respondent shall file an Answer (the "Answer") which shall, inter alia, contain the following information: (a) its name in full, description and address; (b) its comments as to the nature and circumstances of the dispute giving rise to the claim(s); (c) its response to the relief sought; (d) any comments concerning the number of arbitrators and their choice in light of the Claimant's proposals and in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby; and (e) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration. ... 5. Any counterclaim(s) made by the Respondent shall be filed with its Answer and shall provide: (a) a description of the nature and circumstances of the dispute giving rise to the counterclaim(s); and (b) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) counterclaimed.

<sup>148</sup> An arbitrator can be challenge when there is a lack of independence.

<sup>149</sup> The acceptance of the arbitrators is an essential act for the establishment of the arbitration, since it determines the responsibility of the arbitrator before the parties, being forced to know the controversy and to issue the award. Treviño, Julio C., Op.cit. footnote No. 101, p. 329.

means of confirmation; (viii) the hearing(s); (ix) the issuance of the award; (x) if so the case, the recognition and enforcement of the award.

We share the opinion of Alejandro Ogarrío when maintaining that the fundamental pillar in the arbitration procedure is the principle of the “autonomy of the will of the parties”, whose main restriction is the denominated “Golden Rule”, that is indeed the second pillar that maintains this strong structure. In accordance with such a rule the parties have to be treated equally and be given the opportunity to defend his/her case on the merits. The equality idea is well appraised in the Model Law of the UNCITRAL, where it is required: to send a copy of all the documents to each party and to each arbitrator, that the arbitrator cannot discuss the case without all the parties are present, that all communication of the arbitrators be informed to all the parties and, that all decision be discussed by all the members of the arbitration tribunal.

Any pact in opposition to this Golden Rule must be considered void; although the governing principle in the commercial relations is the free willing parties principle, these cannot, for example, decide that the faculties of the arbitral tribunal go against the public order or that their decisions affect third parties.

In the arbitration procedure, it is doubtlessly more effective “to convince” than “to impose measures”, which means that the arbitrators must take into account that far from acting as dictators whose decisions must be unquestionable, they must try to make the parties see that their decisions are the right point for each situation.

The arbitral tribunal, among others faculties has the one to decide on his own competition<sup>150</sup> and to issue interim measures. As mentioned before, these measures are obeyed generally voluntarily in order not to contradict who is going to resolve the arbitration, although formally, it does not exist obligation to accept them due to the lack imperium faculty of the arbitrators. In order to force the parties to accept them, the arbitrator will have to ask for the attendance of a judge, respecting what has been settled down in international treaties. Also, it exists the possibility of recognizing and enforcing a provisional award.

#### **2.1.4.15.4.1. The Rules.**

The rules are the guidelines that the parties and the arbitrators must follow to bring the controversy to an end. It is important to be very conscientious that the “applicable

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<sup>150</sup> There is a whole theory on this, named the doctrine of Competence/Competence, as Szurski recognizes: “The main practical advantage of this principle is that it constitutes a serious bar for a party who desires delay or wishes to repudiate his arbitration agreement, to subvert the arbitration clause by questioning in court the existence or validity of the arbitration agreement (by questioning the validity of the main contract).” Szurski, “Arbitration Agreement and Competence of the Arbitral Tribunal” in ICCA Congress Series, No. 2: UNCITRAL’s Project for a Model Law on International Commercial Arbitration (Lausanne meeting 1984, pp. 53, 76.

legislation” includes both, the substantive law or “*lex contractus*” as well as the adjective law or “*lex arbitri*”.

When talking about arbitral proceedings, we must continue making the separation of ad-hoc arbitration against institutional one. In ad-hoc arbitration, the parties establish the form and terms in which the procedure will be taken, considering the needs of the specific case. Nevertheless, it is recommendable they do not risk trying to write up their own rules, since it is far better they adopt some previously decided rules by some well-experienced institution. If this is not possible, leaving total freedom to the arbitral tribunal is suggested. In institutional arbitration, the procedure will be that foreseen in the rules of the corresponding institution, with the possibility, sometimes, to agree otherwise some provisions. Some provisions do not allow modification, as it is the case that the award is reviewed by the Court of Arbitration of the ICC, when the case is administered by this institution.

Then, the procedures can be so different from each other, as the disputes themselves. For that reason, we only want to emphasize the importance that the will of the parties have, in ad-hoc arbitrations and the set of institutional rules, in institutional arbitrations. With respect to the applicable supplemental law of these rules, will be that agreed by the parties expressly or, in the absence of it, by the applicable adjective law of the place of the arbitration.

#### **2.1.4.15.4.2. Previous Hearing.**

Right after the arbitral tribunal has been set up, the parties and the arbitral tribunal can agree to have a “hearing previous to the arbitral activities”. These hearings previous to the arbitral activities allow the parties and the arbitral tribunal to take total advantage of the flexibility benefit of the procedure. If this programming of the procedure is not carried out, especially in international arbitrations, ambiguities, delays and majors costs can be originated. For this reason, the UNCITRAL made a document titled “UNCITRAL Notes on the Organization of the Arbitral Tribunal”, the purpose of these Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.<sup>151</sup>

Before the hearing, the arbitral tribunal must prepare a program to be analyzed during the hearing, which has to be sent to the parties in advance. After the hearing, the arbitral tribunal must draft a document, dully signed by all the participants where all the decisions taken should be contained. Generally, the advantages of the previous hearings are: (i) to examine and set out the later activities and hearings; (ii) the preparation of the parties for the installation of the activities; (iii) that the parties have major intervention and assume an important degree of initiative in the procedure; (iv) to avoid misinterpretations when the

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<sup>151</sup> See the Notes, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

arbitrators and the parties have different points of view with respect to the form of acting and to what is established in the arbitration agreement; (v) to avoid that the president of the arbitral tribunal, or the parties in mutual agreement, issue orders with respect to the procedure, and; (vi) to accelerate the procedure.

#### **2.1.4.15.4.3. The Hearing.**

The hearing, also known as meeting, is usually held when the arbitral tribunal consists of more than one arbitrator. It is the perfect moment to meet amongst the arbitrators and with the parties themselves. Also, it is the right moment to verbally present their cases and to expose some evidence to the arbitral tribunal. The hearings can be held at any place the arbitral tribunal decides, considering their residences and the parties' residence, as well as some important factors such as administrative aspects, the budget of the case, the availability of the parties, the political and social environment of the country where the meeting is supposed to be held.

There can be as many meetings as the arbitral tribunal decides; however the important characteristic of rapidness has to be always considered. The parties can assist the hearing but they are not obliged to do so. The rules that govern the procedure generally foresee that the arbitral tribunal will have the discretion to organize the hearing, without establishing many provisions for it. The arbitral tribunal will exercise such faculty in the way they consider more appropriate but respecting always the Golden Rule we have already made reference.

Meeting are usually held at hotel conference rooms, but there are some arbitral institutions that can provide the parties and arbitral tribunal these services by renting them comfortable rooms with all the services required. The arbitral tribunal can be assisted by a stenographer, interpreters when is necessary and any other administrative support.<sup>152</sup>

#### **2.1.4.15.4.4. The Evidence Stage.**

As part of the arbitration procedure, the evidence stage is subject to what has been decided by the parties, who generally regulate its limits and conditions at the previous hearings.<sup>153</sup> In the arbitration procedure the allowed evidence are those that the parties want, or in case nothing is agreed, those that the arbitral tribunal considers advisable.

The UNCITRAL has determined that the evidence practices in the arbitration procedures follow different models:

1. The Adversarial System. Under this model, it essentially corresponds to the parties to reunite evidence and to present them to the arbitral tribunal, who does not play an active

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<sup>152</sup> For further information on Meetings and Hearings see: Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 238.

<sup>153</sup> See supra pp. 69.



role in the evidence stage. The basic evidence is presented in the form of verbal testimony and the party that denies a fact can verify this testimony by means of the contradictory examination of the witness.

2. The inquisitorial system. In this system, although the principle that states that the parties must demonstrate the facts they allege in their favour is considered, it also allows that the arbitral tribunal takes the initiative in the practice of the evidence.<sup>154</sup>

According to the UNCITRAL, the line that divides both systems has disappeared and hybrid models are preferred to be followed. The documents that regulate arbitration matters do not specifically regulate this part of the procedure, being the Arbitration Rules of the UNCITRAL the only document we found that takes care more of these questions and, as a result, many questions of the evidence stage, are left to the discretion of the arbitral tribunal.

On the other hand, the International Bar Association (IBA)<sup>155</sup> approved in 2008 the “IBA Rules on the Taking of Evidence in International Commercial Arbitration”.<sup>156</sup> According to the Preamble of the “IBA Rules of Evidence”, as they are known, (i) These rules are intended to govern in an efficient and economical manner the taking of evidence in international commercial arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional or ad hoc rules according to which the Parties are conducting their arbitration; (ii) Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration; (iii) Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be Appropriate; (iv) The taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely.

#### **2.1.4.15.4.5. The Award.**

<sup>154</sup> This system is equitable to the mentioned by Heuer and Penrod as Autocratic.

<sup>155</sup> The International Bar Association (IBA), established in 1947, is the world’s leading organization of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 35,000 individual lawyers and 197 bar associations and law societies spanning all continents. It has considerable expertise in providing assistance to the global legal community. See [http://www.ibanet.org/About\\_the\\_IBA/About\\_the\\_IBA.aspx](http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx).

<sup>156</sup> Available at <http://www.ibanet.org/Search/Default.aspx?q=evidence>. The IBA also published the IBA Guidelines on Conflicts of Interest in International Arbitration.

When talking about the award, we need to start with the concept of “power”, understanding it as the capacity to rule the other’s conduct. This is a clue sociological concept, since it is present in any social relationship.<sup>157</sup> Every power relation involves two people or two groups of people: those who have the power and those who obey, in other words, the governor and the governed. In this case, we have already talked about the role of the arbitral tribunal and the faculties they were granted by the parties. As consequence of these faculties they turn into governors and the parties into governed in this legal relationship. Thus the arbitral tribunal has the power to render an award. This idea matches perfectly with the decisionism theory of Carl Schmitt, who, at beginnings of the Twenties, would openly reject the normativism of Kant with the purpose to set up this theory that, from the legal point of view, indicated that interpretation and application of a specific law depended on the decision of the judge (in this case, the arbitral tribunal) and not on another law.<sup>158</sup>

The arbitral procedure finishes with the decision of the entity or authority that analyzed the dispute, which is called “arbitral award or arbitration judgment”. The arbitration rules give the arbitral tribunal a time-limit to render the award, which is generally deferrable at discretion of the own tribunal or of the institution, as it is indicated in the rules.

Three types of arbitral awards exist:

1. Final award. It indicates the completion of the activities within the procedure that deals with the merits of the case, based on all the documents and other evidence presented by the parties.
2. Interim award. It is rendered during a procedure regarding incidental questions. Its foundation is the discretion of the arbitral tribunal to carry out the procedure.
3. Award by agreement of the parties. It occurs in case the parties reach a solution during the procedure that ends the conflict.

The award must be in writing and the decisions must be taken by majority, in case the tribunal is integrated by more than two arbitrators. If an arbitrator is not in agreement with the others, he/she has to state it on the award and if he/she refuses to sign, the reason of such a denial has to be stated as well. In case of tie, the president of the tribunal will have

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<sup>157</sup> For further information on the judicial sanction see. Ferrari, Vincenzo, Op.cit. footnote No. 128, pp. 87.

<sup>158</sup> The Decisionism that had been very important during centuries XVI and XVII (it means, when the Modern State appears as the Absolutist State) was dramatically dulled by the rationalism of the century XVIII that diminished the role of the sovereign authority through liberal thinkers as John Locke and his doctrine of the constitutional government, Montesquieu and its doctrine of the separation of powers and by Kant. Schmitt, as legitimate heir of the Hobbesian thought, valued above everything, the necessity of the maintenance of social peace and this was the supreme aim of any political decision. The schmittian Decisionism did not imply an elimination of the positive legality but for him, the order was the result of the mediation between the norm and the decision. Nieto, Eduardo Hernando, “el Decisionismo Politico de Carl Schmitt“, *Atículos de Metapolítica*, 2004, available at: <http://eduardohernandonieto.blogspot.com/2007/09/el-decisionismo-politico-de-carl.html>



casting vote. The arbitral award, besides dealing with the merits of the case, must consider the costs of the arbitration.

There are differences between the award rendered in a Law Arbitration and the one that results from an Equity Arbitration. In the first one, the award must be reasoned according to the rules that were previously selected to resolve the case, and in the second one, for being an award rendered according to consciousness, justification is not required.

A question that can arise when speaking of the arbitral award, is whether the arbitral tribunal is capable enough to declare punitive damages to the losing party.<sup>159</sup> On the matter, we can say that the punitive damages do not constitute a claim but a remedy, reason why if the repair of these damages is not obtained by means of the arbitration, cannot be later seek with other channels for being *res judicata*.<sup>160</sup>

The question of punitive damages does not arise normally in jurisdictions different from the one in the United States of America. In agreement with M. Scott Donahey,<sup>161</sup> several situations where the punitive damages can arise in arbitration exist:

1. When the parties give specific or ample powers in the arbitration agreement, authorizing the arbitral tribunal to grant punitive damages. Even though the parties, by means of their agreement, have specifically authorized the arbitral tribunal to condemn punitive damages, it is not always clear if they can exert them. The courts at the State of New York consider that although such agreement between the parties exists, the arbitral tribunal cannot condemn these damages, since the sanction of punitive damages is reserved to the State and since the execution of an award with punitive damages would be a totally private decision, it would strongly violate the public order and consequently, all award in this sense must be void.<sup>162</sup> Courts in other states of the American union as Alabama allow arbitrators to grant punitive damages.
2. When the parties select a substantive legislation that allows the award with punitive damages in arbitration procedures. When the law of New York for example, is stipulated as the law for the merits and if the place of the arbitration is another State of the United

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<sup>159</sup> The payment to the punitive damages is that one that the plaintiff receives in a scale or greater proportion to the caused material damage. The foundation of the payment of such an exorbitant amount is the fact that the received damage was aggravated by violence circumstances, oppression, maliciousness, fraud or a lewd or cruel conduct by the defendant and the purpose is to compensate the plaintiff for mental torment, laceration in its feelings, degradation or any other aggravating of the original damage. These damages also are known as "vindicatory" and have a greater application in the system of common law. See the case: *Wetherbee v. United Ins. Co. of America*, 18 C.A.3d 266, 95 Cal. Rptr. 678,680.

<sup>160</sup> *Res judicata* or *res iudicata* (RJ) is the Latin term for "a matter (already) judged", and may refer to two things: in both civil law and common law legal systems, a case in which there has been a final judgment and is no longer subject to appeal; and the term is also used to refer to the legal doctrine meant to bar (or preclude) continued litigation of such cases between the same parties, which is different between the two legal systems. In this latter usage, the term is synonymous with "preclusion". See [http://en.wikipedia.org/wiki/Res\\_judicata](http://en.wikipedia.org/wiki/Res_judicata)

<sup>161</sup> Partner at, Holtzmann Wise & Shepard. Donahey, Scott M., "Award of Punitive Damages", *Singapore International Arbitration Centre Magazine*, April 1994.

<sup>162</sup> See the case: *Garrity v. Lyle Stuart, Inc.* (40N.Y.2d354).

States where the courts do not prohibit the parties to grant powers to the arbitrators in this respect, by means of the arbitration agreement, some courts have concluded that the parties, in an indirect way, by selecting the substantive law, have decided not to grant such faculty to the arbitral tribunal, being based on which the prohibition is part of the substantive law of the State of New York.

3. When the arbitration is handled in a jurisdiction that allows the arbitrators to grant punitive damages. In contrast to the mentioned in the previous paragraph, certain courts have maintained that the faculty to grant powers to the arbitral tribunal to sanction the punitive damages derive from the procedural scope, it means from the arbitration law (*lex arbitri*) of the place of the arbitration, reason why it would not exist any limitation.<sup>163</sup>

The Supreme Court of the United States of America has maintained that the courts in this country must refuse to execute punitive damages content in a foreign arbitral award, and which base is a foreign law, based on the ground that it goes against public order (Art. V of the NY Convention) since this goes against the North American Antitrust Law.<sup>164</sup>

In conclusion, when the parties decide to authorize the arbitral tribunal to grant punitive damages in international commercial arbitrations, the arbitrators must let the parties know the risk they take in the possible negation when asking for the enforcement of the arbitral award, since the public order cause can be invoked by the corresponding judge.

The two most important characteristics of the arbitral award are the following:

1. Definitiveness: it means that by the simple fact that the parties have decided to put the solution of the controversy under arbitration, they resign to any resource that could use. The exception would be, demanding the illegality of such a document for not having been issued by a competent person or for not having followed the procedure established in the applicable adjective rules, or for not having used the agreed substantive law. In other words, that is not in accordance with that agreed upon the arbitration agreement.

2. Enforceability: it means that the parties are committed to execute or to fulfil without any delay the arbitral award.<sup>165</sup> Nevertheless, it is difficult to know what “without any delay” means, since the losing party could argue that he/she needs long time to be able to fulfil such an arbitral decision. On the matter, the international commercial law has a solution to this problem through the New York Convention.

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<sup>163</sup> The federals courts of the United States of America have allowed in several occasions that the arbitrators grant punitive damages, suggesting that the arbitration law for international arbitrations is the Federal Arbitration Law of the USA with no matter that each State has its own intern arbitration law.

<sup>164</sup> See the case: Mitsubishi Motors Corp. V Soler Chrysler-Plymouth (105 S.Ct.3346(1985))

<sup>165</sup> According to Dr. Ottoarndt Glossner, 90% of the arbitration awards result of procedures before the ICC are fulfilled voluntarily. Glossner, Ottoarndt, “The Influence of the International Chamber of Commerce upon Modern Arbitration”, “60 years of ICC Arbitration, a Look at the Future”, ICC Publishing, S.A., 1984, Paris, France, p. 403.

According to Redfern and Hunter there are the following remedies from which the arbitrators might choose, when deciding a dispute and drafting an award:<sup>166</sup>

- (i) Monetary compensation. This is the most common remedy. With this remedy, the arbitral tribunal directs the payment of a sum of money by one party to the other. This payment may represent money due under a contract or compensation (damage) for loss suffered.
- (ii) Punitive damages and other penalties. We have already talked about punitive damages.<sup>167</sup> The question of whether an arbitral tribunal has the power to impose penal sanctions will depend: on the law of the place of arbitration (*lex arbitri*); and on the terms of the arbitration agreement.
- (iii) Rectification. This remedy is virtually unknown in civil law countries and is treated in the same sense as adaptation of contract and “filling gaps”. In common law countries these concepts are considered separately. An arbitral tribunal may make an order for rectification of a contract if empowered to do so by the parties.
- (iv) Restitution and specific performance. An arbitral tribunal may be authorized by the parties or by the applicable law to order specific performance of a contract. Restitution represents an attempt to put the clock back, in other words, it seeks to put the aggrieved party in the same position as he would have occupied if the wrongful act had not taken place.
- (v) Injunctions. There is no objection to an arbitral tribunal to grant relief by way of injunction, if requested to do so. However, request for injunctive relief often involve third parties, the intervention of a bank for example. Arbitral tribunals are not usually empowered to make effective orders against third parties without the assistance of a competent court.
- (vi) Declaratory relief. An arbitral tribunal may be asked to make an award which is simply declaratory of the rights of the parties. By doing this, the parties only gets a declaration that some rights exist according to the contract.
- (vii) Interest and costs. An award for the payment of a monetary sum may generally include an award of interest, and an award in respect of other forms of relief discussed above may carry with it an award of costs. Institutional arbitrations are subject to the cost policy previously published.

#### **2.1.4.15.4.6. The Award Recognition and Enforcement.**

<sup>166</sup> Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 360.

<sup>167</sup> See supra pp. 73.

As we had already mentioned, the arbitrators do not have *imperium* faculty and thus it is impossible that they coercively force the parties to comply with what is foreseen by the arbitral award; nevertheless, the parties have the possibility of going before a judge, who does have the *imperium* faculty, to ask him to recognize and enforce the award issued by the arbitral tribunal.

Concerning awards issued in a foreign country, the New York Convention was created that governs indeed the recognition and enforcement of this type of arbitral awards.<sup>168</sup>

In case of asking for the recognition and enforcement of an arbitral award, neither the inferior judge nor the superior court will be able to examine nor to decide on the fairness or unfairness of the decision nor on the merits of the case, limiting him/herself to solely examine the authenticity and if it is enforceable or not, according to the applicable law.

The arbitral award does not require to be homologated<sup>169</sup> in the country in which is issued. It is simply required that the winning party takes it to the country where is sought to be enforced with the fulfilment of two conditions:<sup>170</sup> (i) that the original of the arbitral award, properly authenticated, is presented; or a copy of that original that meets the conditions required for its authenticity. In case the award is in another language different from the one of the country where the recognition and the enforcement is asked, a certified translation must be attached. The translation can be done by an official translator, a sworn translator, or a diplomatic or consular agent, and; (ii) that the original of the arbitration agreement, or a copy that meets the conditions required for its authenticity, is accompanied.

The enforcement of the arbitral award will be granted in accordance with the applicable procedural rules of the territory in which it is invoked. And for the recognition or enforcement of the arbitral awards, more appreciably rigorous conditions will not prevail, neither higher honorary or costs than the applicable to the recognition or enforcement for national arbitral awards.

Article V of the New York Convention, as well as articles 35 and 36 of the Model Law of the UNCITRAL are of extreme importance, since they contain the causes under which the court that has secondary jurisdiction in the arbitration procedure can reject the enforcement of the arbitral award, under the understood that those factors affect the validity of this decision. The request for not recognizing or enforcing the arbitral award, will have to be done at the request of the party against whom it is invoked, if this party proves one of those causes, before the competent authority of the country in which the recognition and enforcement is sought. If so, the arbitration agreement will be considered void, ineffective or inapplicable.

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<sup>168</sup> See *infra* pp. 211.

<sup>169</sup> Homologation is the judgment that in some countries the courts issue to give legal force to arbitration awards and turn them into true judgments, with executive effectiveness. In some legislations of other countries, it does not happen thus and maintain that the awards are not true judgments while they are not homologated.

<sup>170</sup> Article IV.

Of extreme relevance is to highlight the fact that the article foresees that the interested party must prove (“if that party proof”) some causal, and even if the party can prove such a causal, the discretion of the judge is deduced, since the article mentions that “Recognition and enforcement of the award may be refused”. It does not say “shall be refused”. The causes are “strict” and no interpretation is permitted. The causes we have made reference are:

1. Incapacity of the parties.

*“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or”*

The court can deduce that the parties did not have capacity according to the applicable legislation to the contract or, in case of not mentioning any applicable legislation, according with the legislation of the place of the arbitration. This limitation includes incompetence for mental insanity, age minority, lack of corporative authorization and lack of an agent authorization. In some cases and as long as it is demonstrable, coercion at the time of expressing the will (duress)<sup>171</sup> could be considered also a lack of capacity.

2. Lack of due notification.

*“The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or”*

The parties must be correctly notified of the designation of the arbitral tribunal and, once constituted, this tribunal must observe a due and fair process, notifying to all the parties any movement in the procedure to give them the opportunity to defend his/her case on the merits. As these concepts can vary from a legal system to another, it is recommendable to follow the agreed rules and in case of a gap or doubt, to use the natural rules of justice. If the primary jurisdiction of the arbitration was carried out without guaranteeing the “Golden Rule”<sup>172</sup> of the arbitration procedure, it is not expected that the second jurisdiction executes the corresponding award.

3. Excess of the powers granted to the arbitrators.

*“The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the*

<sup>171</sup> This is how it is known at the common law System.

<sup>172</sup> See supra pp. 49 and infra pp. 119.

*decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or”*

This one has been the most invoked causal when soliciting the invalidity of the arbitral award since the application scope of the excess of powers is very broad and depends on each jurisdiction. Inclusively, it could be argued that the decision that declares an error of law is an excess of authority given to the arbitral tribunal, although the criteria to be used must be argued and reasoned by the competent judge.

4. Composition of the arbitral tribunal.

*“The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or”*

The foundation of this causal is the consensual nature of the procedure and therefore the composition of the arbitral tribunal must be totally in accordance with the will of the parties. Although this is a matter that is expected to be analyzed by the primary jurisdiction of the arbitral tribunal, the New York Convention and the Model Law authorizes the secondary jurisdiction of the courts to be able to deny the enforcement of the award when the court has not been constituted in accordance with the agreement of the parties.

5. The arbitration award is not final.

*“The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”*

When some resource of invalidity is pending or any appeal foreseen at the applicable legislation and other review processes are pending, as it would be the case of the scrutiny<sup>173</sup> of the award by the International Court of Arbitration of the ICC, the enforcement of the award shall be denied.<sup>174</sup>

Whereas the five before mentioned causes are related to errors or matters derived from the first jurisdiction, two other causes related to the secondary jurisdiction are foreseen.

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<sup>173</sup> Scrutiny of the Award by the Court:

“Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”

<sup>174</sup> If the assumption contemplated in this interjection of the article occurs, the authority before which this sentence is invoked will be able, if it considers it suitable, to postpone the decision on the execution of the award and, at the request of the party that requests the execution, it will be able also to order the other party that gives appropriate guarantees.

6. Non-arbitrability.

*“The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or”*

As it was already mentioned, according to the doctrine, only the disputes that involves directly the parties and subject to their previous agreement, could be resolved by means of arbitration. If public interests exist in the dispute, then its resolution by means of this method will be impossible.

7. Public order of the secondary jurisdiction.

*“The recognition or enforcement of the award would be contrary to the public policy of that country.”*

The enforcement is refused under the ground that goes against the public order. The content of public order varies from a legal system to another and the application of this causal provides certain legal insecurity in this last stage of the arbitration procedure. Everything depends on the attitudes of the courts that throughout jurisprudence they will be restricting this width of action. Americans Courts have restricted this cause to foreign arbitral awards.<sup>175</sup> In England, like in countries in Asia, the opinion of Donaldson MR is applied, who said that an arbitral award should not be refused for enforcement under the cause to go against public order, except when there are illegality elements or that the enforcement is clearly opposite to public well-being or, possibly, that the enforcement is completely offensive to ordinary reasoning and that of members of the public in whose representation are exerted the powers of the state.<sup>176</sup>

In order to guarantee the before mentioned, countries with ample experience on the matter, agree that there are two types of public orders: (i) domestic or national and (ii) international. The New York Convention refers to the international public order and not to a national concept, since as we already mentioned, it can vary from country to country. The international connotation refers to cases like genocide, slavery or that the matter is not susceptible of arbitration. In other words, to respect the public order is to give equality of rights to the parties and not to affect goods of third parties who do not have direct participation in the arbitration procedure.

There are two arbitral award, one German and the other Swiss which have been very important in this respect, establishing that one is against international public order when is in presence of any of these two principles:

<sup>175</sup> See the case: Parson and Whittemore Overseas Co. V Societe Generale De L'industrie du Papier (1974) 508 F. 2d. 969 (2d. Cir).

<sup>176</sup> See the case: Deutsche Schabachtbau v Ras al-Khaiman National Oil Co. (1990) 1 AC 295.



1. The negation of the elementary principles of justice.
2. The rupture of the internal economy.

Although these principles are very abstract and subjective, they are a good parameter to determine this cause of non-recognition and non-enforceability of the arbitral awards. The arbitral award is unappealable.

Finally, the Convention foresees that the provisions therein contained will not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States, nor deprive any interested party of any right he/she may have to avail him/herself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such an award is sought to be relied upon.<sup>177</sup>

## **2.2. The Concept of Oil & Gas.**

### **2.2.1. What is Oil & Gas?**

The economic development of a country depends, fundamentally, on the available natural resources and on the adequate way it takes advantage of them.

The Natural Resources, according to Jorge L. Tamayo<sup>178</sup>, “are the elements on the nature that men can take advantage of, to satisfy their necessities, and when obtaining them, the man, as a social being, has not contributed.” Quoting Zimmermann<sup>179</sup>, he adds that these resources “are dynamics, corresponding not only to the knowledge growing, to the improvement of arts and to the development of science, but also as a response to the individual changing necessities and social aims.”

From the perspective of availability, based upon their use, the resources are classified into permanent,<sup>180</sup> renewable<sup>181</sup> and non-renewable. Being the first ones those with a long lasting duration, in comparison to human life, that leads us to conclude that their availability is practically limitless. The renewable ones are those that are regenerated without man’s intervention or are replaced throughout the passing of time. Finally, the

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<sup>177</sup> On the effects that the ratification of the Convention of New York had in Mexico, See Siqueiros, Jose Luis, “Reconocimiento y Ejecución de Laudos Extranjeros en la República Mexicana”, “Revista de la Facultad de Derecho de México”, XXVII, 107-108, julio-diciembre 1977, p. 813. There judicial resolutions are mentioned that order the execution of foreign awards applying the dispositions of the Convention.

<sup>178</sup> Tamayo, Jorge L., “General Geography of Mexico”, Volume IV., Mexican Institute of Economic Researches. Mexico, 1962, p. 30.

<sup>179</sup> Zimmermann, Erich W. “Resources and Industries of the World”, Editorial Fondo de Cultura Económica. Mexico, 1957, p.15.

<sup>180</sup> So it is the case of the solar energy, the atmosphere, the water of the oceans.

<sup>181</sup> Formed by the biological beings (vegetal and animal) who have reproduction capacity and whose limit of permanence is only reached if their destruction is superior to their capacity of reproduction.

non-renewable ones (exhaustive or usable up) are minerals, which are found in well delimited deposits.

The formation of petroleum, understood as a liquid compound (hydrocarbon mixture of several molecular weights, besides other organic compounds) that is formed in a natural way, and which is found in rocky formations, is associated to the development of sedimentary rocks deposited in marine atmospheres or next to the sea, and is the result of decomposition processes of organisms of vegetal and animal origin, that in remote times were incorporated to those deposits.

There are four basic conditions that must be added to obtain the accumulation of petroleum:<sup>182</sup>

- (i) A permeable rock, so that under pressure petroleum can move through microscopic pores of the rock;
- (ii) An impermeable rock, that avoids the escape of oil and gas towards the surface;
- (iii) The oilfield must behave like a trap, since the impermeable rocks must be static in such form that do not exist lateral motions of hydrocarbon leak, and
- (iv) It must exist sufficient organic material and necessary to become petroleum by the effect of the pressure and temperature that predominates in the oilfield.

Petroleum can generate, through industrial processes of transformation, diverse products of high value, such as fuels, lubricants, waxes, solvents and petrochemical derivatives.

### **2.2.2. Oil & Gas Industry.**

The origin of the petroleum industry (Oil & Gas industry) at world-wide level, is bound to the activities performed by humans focused to identify and commercialize this product, so that considered as a non-renewable energy resource, its production has contributed to the development of the nations.

The Oil & Gas industry is considered in the world as a strategic activity that generates goods and services that makes the economic growth and the development of the countries possible.

In general terms, we must understand by the petroleum industry, as the one that takes care of the exploring, exploiting, transporting, commercializing and refinement of petroleum and/or the derivatives extracted from its refinement.

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<sup>182</sup> See: [www.imp.mx/petróleo/](http://www.imp.mx/petróleo/)

### Chevron's Jack #2 offshore oil platform



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Given the importance acquired by this industry throughout the years, the main producing countries are organized from 1960 to protect their interests,<sup>184</sup> in search of obtaining stability of prices and opportune provision to the consumers.

The evolution of the Oil & Gas industry allows us to identify diverse elements that are added to conform to the concept of this industry. Indeed, the difficulties that were faced when carrying out the first boreholes and the constant fight against nature at the oil exploitations zones, made difficult, at the beginning, that this industry were an income-producing business.

A first element that happens to comprise of the concept of the Oil & Gas industry, is the sum of capitals, the research and the technological development required as well as the sum of wills to commercialize a natural resource.

A second element is the natural resource itself, considered as a non-renewable energy resource. In this industry natural resources are used which reserves decrease with the exploiting, turning them into energy resources of little future. Their reserves are being reduced over the years and their constant extraction.

A third element is the situation that keeps the Oil & Gas drilling operations against the new renewable energies, called “clean” energies because they reduce the impacts to the

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<sup>183</sup> This is a picture of the Chevron's Jack #2 offshore oil platform, similar to this rig, discovered oil some 27,000 feet below the surface of the Gulf of Mexico, nearly 200 miles off the coast of Louisiana, taken from: <http://evworld.com/article.cfm?storyid=1153>.

ucpressebooks/view?docId=ft3q2nb28s;chunk.id=d0e2357;doc.view=print.

<sup>184</sup> See OPEC supra p. 12

environment. Example of these energies are, the solar one, the wind power, the hydraulics, the tidal one, geothermal or the biomass and even the nuclear one that is considered non-renewable for being a mineral: the uranium, its main fuel. This element brings with itself a range of economic, political and social aspects that have surrounded, permanently, the Oil & Gas industry, since it is a commercial good. This industry is and has been responsible for the radical transformations of the productive structures of the industrialized countries.

Oil & Gas is an industry that acquired a vertiginous importance since the first decades of century XX, motivated partly by the appearance of the internal combustion motor. It was used in the railroads, in the ships of the commercial lines and merchant fleets. It was the base of the driving force and calorific of a great number of manufacturing and transformation industries, as well as in electrical generation power stations, besides the feeding of motors on airplanes and automobiles. With time, the processes of refinement of petroleum and the development of the petrochemical industry consolidated its future.

### **2.2.3. Oil & Gas Processes.**

In the petroleum industry, a field is an area without substantial interruption by one or more reservoirs of commercially valuable oil or gas, or both. A single reservoir (or group of reservoirs which cannot be separately produced) is a pool. Several pools separated from one another by barren, impermeable rock may be superimposed one above another within the same field. Pools have variable areal extent. Any sufficiently deep well located within the field should produce from one or more pools. However, each well cannot produce from every pool, because different pools have different areal limits. Development of a field includes the location, drilling, completion, and equipment of wells necessary to produce the commercially recoverable oil and gas in the field.<sup>185</sup>

Oil and gas production necessarily are intimately related, since approximately one-third of the gross gas production in the United States is produced from wells that are classified as oil wells. However, the naturally occurring hydrocarbons of petroleum are not only liquid and gaseous but may even be found in a solid state, such as asphaltite and some asphalts. Where gas is produced without oil, the production problems are simplified because the product flows naturally throughout the life of the well and does not have to be lifted to the surface. However, there are sometimes problems of water accumulations in gas wells, and it is necessary to pump the water from the wells to maintain maximum, or economical, gas production. The line of demarcation between oil wells and gas wells is not definitely established. Most gas wells produce quantities of condensable vapours, such as propane and butane, that may be liquefied and marketed for fuel, and the more stable liquids produced with gas can be utilized as natural gasoline.

The Petroleum Industry includes a diversity of processes, to which we briefly refer:

#### **2.2.3.1. Exploration.**

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<sup>185</sup> “Oil and gas field exploitation”, Answers.com, available at. <http://www.answers.com/topic/oil-and-gas-field-exploitation>.

Exploration is the act of searching or travelling a terrain for the purpose of discovery, in this case Oil & Gas. It is the phase of the Oil & Gas operations that has a set of techniques that allow to locate and to detect in the subsoil, formation with possible hydrocarbon accumulation. Most exploration is still carried out by private companies. They used to get a concession from the hosting countries, but that system is almost dead. Nowadays, permits are usually granted. The arrangement vary from those that resemble vastly modified concessions, to production-sharing agreements, to simple contracts for drilling or operating in an area where the host government or its state oil company owns all petroleum rights.

Most petroleum deposits lie so deeply buried that no surface features hint at their presence. Scientists use the science of seismology for exploration. This science is the study of sounds waves that bounce off buried rock layers. Oil explorationists create a low-frequency sound on the ground or in the water. The sound can be an explosion or a vibration. This penetrates the many layers of rocks. On the surface or in the water special devices, termed geophones or hydrophones, pick up the reflected sounds. Explorationists take the recordings to a special laboratory where personnel use powerful computers to analyze and process the recordings.<sup>186</sup>

#### **2.2.3.2. Exploitation.**

Also known as production or extraction, exploitation is the phase of the Oil & Gas operations that has a set of techniques destined to the hydrocarbon production. The oil well is created by drilling a hole into the earth with an oil rig. A steel pipe (casing) is placed in the hole, to provide structural integrity to the newly drilled wellbore. Holes are then made in the base of the well to enable oil to pass into the bore. Finally a collection of valves called a “Christmas Tree” is fitted to the top, the valves regulating pressures and controlling flows.<sup>187</sup>

#### **2.2.3.3. Refinement.**

It is the process throughout which the hydrocarbons are separated, either individually or in similar sets, to industrially use them, by means of the distillation and cracking that are the basic procedures. In other words, this process is used where crude oil wants to be processed and refined into more useful petroleum products, such as gasoline, diesel fuel, asphalt base, heating oil, kerosene, and liquefied petroleum gas.

As stated in United States Patent granted to the Standard Oil Company in 1934, this invention relates to an oil refining process and it pertains more particularly to the sharp

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<sup>186</sup> Smith, Dzienkowski, Anderson, Conine, Lowe, Kramer, “International Petroleum Transactions”, Second Edition, Rocky Mountain Mineral Law Foundation, Denver, Colorado, 2000, pp.41.

<sup>187</sup> [http://en.wikipedia.org/wiki/Extraction\\_of\\_petroleum](http://en.wikipedia.org/wiki/Extraction_of_petroleum)

fractionation of high quality lubricating oils from low quality materials and resins with which the high quality oils are normally associated.<sup>188</sup>

#### 2.2.3.4. Transport.

Oil Transport is the action of transferring crude and derivatives through several systems; by oil pipes, tankers and ship tanks. Crude oil must be moved from the production site to refineries and from refineries to consumers. These movements are made using a number of different modes of transportation. Crude oil and refined products are transported across the water in barges and tankers. On land, crude oil and products are moved using pipelines, trucks, and trains.<sup>189</sup>

Mexico contains an estimated 17,600 miles of crude oil pipelines, 6,300 miles of petroleum products pipelines and 875 miles of petrochemical pipelines. The ports of Cayo Arcos, Dos Bocas, and Pajaritos on the Gulf handle most PEMEX's oil exports.<sup>190</sup>

#### Mexico's National Oil Pipeline System.



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In some instances, methods of marketing are affected by special transformations requirements. This is generally true of natural gas, which is transported by pipelines or specially designed tankers carrying liquid natural gas (LNG). Unless there is an assured market locked in through long-term contracts, financing for massive investments in these

<sup>188</sup> United States Patent Office, 2,079,886, Vanderveer Voorhees, Hammond, Ind. Assignor to Standar Oil Company, Chicago, Ill., a corporation of Indiana, Application December 29, 1934. <http://www.google.com.mx/patents?hl=es&lr=&vid=USPAT2079886&id=muRhAAAAEBAJ&oi=fnd&dq=oil+refinement+process&printsec=abstract#v=onepage&q=oil%20refinement%20process&f=true>.

<sup>189</sup> [http://www.petrostrategies.org/Learning\\_Center/oil\\_transportation.htm](http://www.petrostrategies.org/Learning_Center/oil_transportation.htm)

<sup>190</sup> "An Energy Overview of Mexico", Department of Energy, United States of America, at [http://www.geni.org/globalenergy/library/national\\_energy\\_grid/mexico/LatinAmericanPowerGuide.shtml](http://www.geni.org/globalenergy/library/national_energy_grid/mexico/LatinAmericanPowerGuide.shtml).

<sup>191</sup> This is a map of the Mexico's National Oil Pipeline System, taken from: [http://www.geni.org/globalenergy/library/national\\_energy\\_grid/mexico/graphics/mexpipln.gif](http://www.geni.org/globalenergy/library/national_energy_grid/mexico/graphics/mexpipln.gif)



special transportations system may be impossible. Transportation of natural gas by pipelines has traditionally cost four or five times as much as the transportation of petroleum with an equivalent energy content. In some instances transportation of LGN by ocean tanker may be twenty times costlier than oil.<sup>192</sup>

#### **2.2.3.5. Commercialization.**

It is the purchase activity of crude and derivative within certain country or abroad, reason why can be classified in international and domestic transactions. Marketing not only is the means by which an oil producer realizes the economic benefits of its contracting, exploration and production efforts, marketing can itself increase the profitability of a venture. Hence, market planning is important at the outset of an oil initiative, and usually even more critical for gas than crude.<sup>193</sup>

There are many different types of transactions through which oil is sold or traded. Term contracts are commitments to sell a specified quantity of oil over a certain period. Although terms contracts are still used, the most common transactions are spot trading, futures trading, forward trading, oil-price swaps, and countertrade. In addition to direct marketing transactions, marketing provisions are also included in host government contracts.<sup>194</sup>

These processes are divided normally into three phases: (i) The Upstream phase which is the exploration and production portions of the oil and gas industry; (ii) The Midstream phase which is the transport, processes and storage of the petroleum industry; and, (iii) The Downstream phase which is the refinement, sale and distribution of the petroleum industry. The mid-operations are included generally in the final category.

#### **2.2.4. Products of the Oil & Gas Industry.**

The products of the petroleum industry are of greater volume and are the fuels<sup>195</sup> and the gasoline.<sup>196</sup> Petroleum is the raw material of many products that are obtained through the activities that are carried out in the petrochemical industry, as they are the pharmacists, solvents, fertilizers, pesticides and plastics, among others.

According to crude oil composition and demand, refineries can produce different shares of petroleum products. The largest share of oil products is used as energy carriers: various grades of fuel oil and gasoline. These energy-carrying fuels include or can be blended to give gasoline, jet fuel, diesel fuel, heating oil, and heavier fuel oils. Heavier (less volatile) fractions can also be used to produce asphalt, tar, paraffin wax, lubricating and other heavy oils. Refineries also produce other chemicals, some of which are used in chemical

<sup>192</sup> Smith, Dzienkowski, Anderson, Conine, Lowe, Kramer, Op.cit. footnote No. 186, pp.41.

<sup>193</sup> Smith, Dzienkowski, Anderson, Conine, Lowe, Kramer, idem., pp.752.

<sup>194</sup> Smith, Dzienkowski, Anderson, Conine, Lowe, Kramer, idem., pp.760.

<sup>195</sup> It is the heaviest fuel amongst those than are possible to be distilled under pressure atmospheric and it is used for electrical energy plants, boilers and furnaces.

<sup>196</sup> It is a hydrocarbon mixture derived from petroleum that is used as fuel in motors of internal combustion.



processes to produce plastics and other useful materials. Since petroleum often contains a couple of percent of sulphur, sulphur is also often produced as a petroleum product. Hydrogen and carbon in the form of petroleum coke may also be produced as petroleum products. The hydrogen produced is often used as an intermediate product for other oil refinery processes such as hydrogen catalytic cracking (hydrocracking) and hydrodesulfurization.<sup>197</sup>

Petroleum is, without a doubt, an industry of the greater relevance for all the nations, for being an essential product for many industries, and is of vital important for the development and the economic growth.

### **2.2.5. World-Wide Panorama of Oil & Gas.**

The greater primary energy source continues being crude petroleum when reaching during the world-wide demand of 2007 an increase of 1,1% with respect to 2006 to arrive at 85,220 thousands of daily barrels (mbd). In the same period, its participation within the total of consumed energy was reduced, from 36.1% to 35.6%, due to higher consumption of coal, natural gas and renewable sources.

At the end of the year 2007, the world-wide volume of proven crude petroleum reserves was 1,237.9 thousands of million barrels, that is 0.1% less with respect to 2006, belonging to the Member States of the Organization of Petroleum Exporting Countries (OPEC) the 75.5% of these reserves.

On the other hand, the world-wide offer of crude registered a diminution of 0.2% in 2007, when being located in 81,533 mbd by the reduction of 356.0 mbd in the production of the Member States of OPEC, in comparison with 2006, and by the losses in the production of countries non-OPEC.

During 2007, the refinement capacity registered an increase of 1,235 mbd (1.4%) with respect to 2006 at world-wide level, when being placed in 87,913 thousands of daily barrels (mbd). In sequence of importance, from largest to smallest, the region of Europe and Eurasia registered the greater capacity at world-wide level with 25,024 mbd, followed by Asia Pacific with 24,601 mbd, and North America with 20,970 mbd. The Middle East located its capacity in 7,525 mbd and Central and South America registered with a processing capacity of 6,513 of mbd and Africa 3,280 mbd.

For the year of 2007, there was a slight increase of 1.2% with respect to 2006, when being placed the average of the world-wide demand in 85,220 mbd. All the petroliferous had increases in its demand between 1.2 and 1.8%, with the exception of the combustoleo that diminished 0.7%.

The construction of new refineries in Africa, Asia Pacific, Eurasia, the Middle East and even in EUA has been announced, with a considered investment superior to the 320,000

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<sup>197</sup> [http://en.wikipedia.org/wiki/Petroleum\\_product](http://en.wikipedia.org/wiki/Petroleum_product)

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mmUSD., reason why, 15 new refineries could enter in operation between 2010 and 2012, meaning an increase in the world-wide refinement capacity around of 2,500 mbd.

The Oil & Gas Industry is, in summary, for the effects of this research, the set of activities tending to the exploitation and commercialization of Oil & Gas that constitute a fundamental element of development of the countries, as a non-renewable resource. Without a doubt, relevant aspects of this subject are the great investments that this industry requires and the economic, social and political impact that it generates in the world. On the other hand, the transition that we nowadays live that arises from the exhaustion of the non-renewable energy sources to the use of the renewable ones, will be cause without a doubt of important controversies that will be, eventually, national or international, and it will tie the producing and consuming petroliferous countries and the great partnerships and companies specialized at world-wide level and even the end users of petroliferous products.<sup>198</sup>

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<sup>198</sup> “Prospective de Petrolíferos 2008-2017”. Ministry of Energy. Mexico, 2008.

## **CHAPTER III**

### **A Socio-Legal Analysis of ADR in Oil & Gas.**

*“Human beings are social beings by nature”*  
*Aristotle*

### 3.1 An Introductory Glance to Legal Sociology.

Law can be seen from inside, immanently, and it can also be seen from outside, extrinsically, in its integration into the social world. The first perspective is the proper of the legal theory, the second is of the sociology of law.<sup>199</sup> The sociology of Law as defined by Vincenzo Ferrari, is “the science that studies the law as a mode of social action”, which on one hand shares the main theory visions with sociology and on the other hand it is adapted to the peculiarity of an object, it means, Law.<sup>200</sup> The purpose of the sociology of law are social facts, which are verified through their observation and testing, and its goal is to establish the causal laws of social events that allow both the description of the occurred phenomena as well as their prediction.

The sociology of law has its origins in the science of general sociology which father has been considered Auguste Comte.<sup>201</sup> As for the sociology of law,<sup>202</sup> several authors have been regarded as its fathers, such as Marx<sup>203</sup>, Durkheim<sup>204</sup>, Montesquieu and Tocqueville<sup>205</sup>.

<sup>199</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 17.

<sup>200</sup> The definition in italian is: “La scienza che studia il Diritto come modalità d’azione sociale”. Ferrari, Vincenzo, Op.cit. footnote No. 128, pp. 3.

<sup>201</sup> Isidore Auguste Marie François Xavier Comte (19 January 1798 – 5 September 1857), better known as Auguste Comte, was a French philosopher. He was a founder of the discipline of sociology and of the doctrine of positivism. He may be regarded as the first philosopher of science in the modern sense of the term.

<sup>202</sup> For further information on the theoretical frame of “the classic” sociology of Law, see Fariñas Dulce, María José, Universidad Carlos III de Madrid, “Marco Teórico de la Sociología del Derecho “Clásica”, “Derecho y Sociedad”, (coordinadores) María José Añón, Roberto Bergalli, Manuel Calvo, Pompeu Casanova, Titant lo Blanch, Valencia, 1998, p.p. 367 – 406.

<sup>203</sup> Karl Marx (1818-1883), although he did not get to constitute a specific work of sociology of Law, his approach about the relations between Law and society has constituted one of the essential contributions in the development of the socio legal studies. Fariñas Dulce, María José, “Fragmentos de Sociología del Derecho”, Op.cit, footnote No. 11, pp. 19.

<sup>204</sup> Emile Durkheim (1858-1912), was a systematizer of the sociological methodology and founder, even from the academic-official point of view of the French sociology, his work “the Rules of the Sociological Method” constituted the departure point of the new era of sociology. Fariñas Dulce, María José, “Fragmentos de Sociología del Derecho”, idem., pp. 19.

<sup>205</sup> Alexis-Charles-Henri Clérel de Tocqueville (29 July 1805, Paris – 16 April 1859, Cannes) was a French political thinker and historian best known for his Democracy in America and The Old Regime and the Revolution (1856). In both of these works, he explored the effects of the rising equality of social conditions on the individual and the state in western societies. Democracy in America (1835), his major work, published after his travels in the United States, is today considered an early work of sociology and political science.

The sociology of law has counted with extraordinary writers, among which worth mentioning are Eugen Ehrlich<sup>206</sup>, Max Weber<sup>207</sup> and Theodor Geiger<sup>208</sup> who have been considered the three mayor pillars of this branch of law. The sociology of law has been considered recently set up around the twentieth century. And in some extent, it has been less explored and exploited than other branches of legal science, fact which is shown by their low proliferation in the curricula of universities with world-wide recognition, at least as it happens in Latin American countries as the case of Mexico.

The sociology of law represents the use of a paramount importance tool which is the field research programs, which are parallel applicable to the theory of law. These programs far from harm it, enrich it in a way that allows us to have a much better knowledge of the theory.

The legal facts to be studied are the use, dominance or power, possession and will declaration, in other words, the human action and its relationship to legal norms. All of this is characterized as the social fact generator of human action rules and legal institutions. One might think that the above should be carried out in an easy and uniform way. However, the authors agree, with what we personally agree, on that there is a struggle between the sociology of law and the traditional legal science. Somehow, and applying this idea to the research topic that brings us to write this paper, we believe that the same struggle can be said between the traditional method of dispute resolution, known as litigation before state courts and alternative methods in resolving disputes, known as ADR.

The sociology of law has been considered recently set up around the twentieth century. It has been intended to study various topics that are as varied as the legal science itself, so that research work can range from criminal issues to business issues, going throughout all the branches that have been classified in various legal systems. In this research we have tried

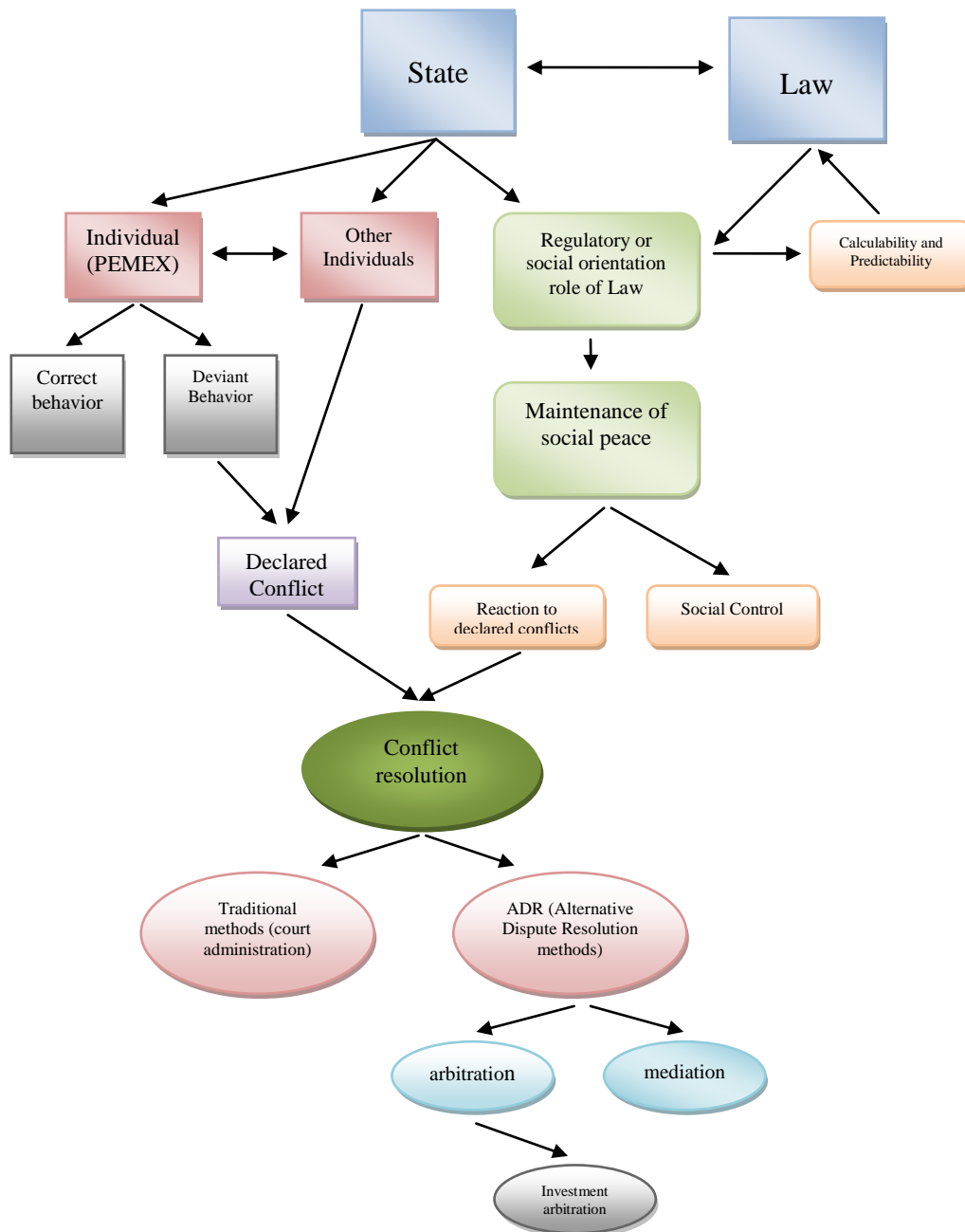
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<sup>206</sup> He was born in 1862 in Czernowitz, capital of Bukovina, region that then belonged to Austria and later it became part of Rumania. In this region numerous ethnic groups coexisted, each with their own customs and styles of life, which influenced Ehrlich in his later studies. Ehrlich considered that Law is in life, in society, reason why a new style of thinking was necessary, to this new style of life was called, indeed, Sociology of Law. Ehrlich also considered that the sociology of Law was the true legal science, which Law did not arise from the legislation nor from the decisions but from the life itself of the social groups. Ehrlich died in 1922.

<sup>207</sup> He was born in Erfurt in 1864, he studied Law. His work is immense, includes multiple fields of sociology, from sociology of politics to sociology of religion. To Weber sociology is a science that tries to understand social acting interpretatively and in this way, explain them by their causes in its pass and its effects; it means, the object of the study of sociology is social acting and not simply the social facts. Its primary object is "to understand" social action, which is only possible by means of interpretation. Weber does not resign to the positivist postulate of the casuistic explanation, but at the same time he introduces as suitable method the one of the interpretative understanding. Weber distinguishes four types of factual regularities of behavior that he named: use, custom, convention and Law (only the last two constitute legitimate orders). Weber died in Munich in 1920.

<sup>208</sup> Geiger was born in Munich in 1891. Also qualified lawyer and dedicated to journalistic activities. He emigrated to Denmark and lived for a while in Sweden. Geiger is the founder of the formal or pure sociology of Law. Geiger criticizes the formalism of the jurists. He especially has a position against the normativism and proposes to replace the theory of Law by the sociology of Law. Geiger proposes to discover in the legal concepts its content of reality, it means, its real meaning, of this way the general theory of Law happens to be sociology of Law. Geiger died in 1952 in the boat that brought to him back from America to Denmark.

to touch only those subjects studied by the sociology of law that apply to ADR in the Oil & Gas industry. In other words, within the sociological issues related to ADR, we found the following we consider of great importance and which will be briefly discussed in order to have the sufficient minimal elements to understand the analysis of arbitrations and mediations on Oil & Gas, mainly those in which PEMEX has participated: regulatory or social orientation role of law, conflict resolution, ADR in business disputes, sociology of oil, international trade and globalization; and legal culture. We have drawn the following diagram with the purpose to make clear those areas of Sociology of Law we consider influence the present research.



### 3.2 Regulatory or Social Orientation Role of Law.

The importance of the regulatory or social orientation role of Law is herein mentioned for being located at the temporally prior point of the function of reacting to declared conflicts. It can be identified as an organizational type function since its ending purpose is the organization of social life. Ferrari defines this function as the ability to “lead a crowd of relatively interdependent people toward the fulfilment of models relatively consistent and universal, it means, models able to suggest decisions on any dilemma of conduct that may arise in social interaction”.<sup>209</sup>

The role of social orientation is performed by general, abstract, universal and consistent regulatory models. Thru this role, Law gives stability to the regulatory models as well as legal certainty, since social actors can understand and predict the effects of their own behaviour and the behaviour of others, and then plan, consequently, their social interaction. Therefore an important consequence of the regulatory function or social orientation is the “calculability and predictability”, that the legal system provides to individuals in their social conduct. To Rehbinder, the regulatory function of Law, which should produce that legal certainty, is based on four ideas that could be designated as the formal principles of justice: (i) the idea of reciprocity, (ii) the idea of duration, (iii) the idea of defining social roles, (iv) the idea of balance of interests.<sup>210</sup>

### 3.3 The Theory of Conflict Resolution.

Conflict and dispute are equal concepts for the purposes of this paper. Although some authors make the difference considering that a conflict may develop into a dispute, if the inconsistent claims are asserted publicly, in other words, if the claims, and their incompatibility, are communicated to someone.<sup>211</sup>

Law is not society, the concept of society is much broader than Law, the latter is a subsystem within the social system. Law is the means of organizing the society and to achieve that goal, it must have different functions, among which one of the most important is to maintain social peace and this is achieved through conflict resolution.<sup>212</sup> Law is simply the rules of the game, game in which social control is found.

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<sup>209</sup> Ferrari, Vincenzo, “Funciones del Derecho”, Traducción de J. de Lucas y Ma. J. Añón, Madrid, Debate, 1989, mencionado por Arnaud, André-Jean, Fariñas Dulce, María José, Op.cit. footnote No. 33, pp. 136.

<sup>210</sup> M, Rehbinder, “Sociología del Derecho”; Trad. De G. Robles, Madrid, Ed. Pirámide, 1981, p. 162, mencionado por Arnaud, André-Jean, Fariñas Dulce, María José, idem., pp. 136.

<sup>211</sup> Abel, Richard L., “A Comparative Theory of Dispute Institutions in Society”, Law & Society Review, Volume 8, Number 2/ Winter 1973, pp. 217.

<sup>212</sup> Other functions of Law within this system of society are: (i) the delimitation of social sub-division function; (ii) the social differentiation function; (iii) the social control function; (iv) the goods and burdens distribution function; (v) the social planning function; (vi) the legitimation of the social system function; and, (vii) the communication function. Robles, Gregorio, Op.cit, footnote No. 5, pp. 82–83, 153.



Law is, according to Parsons, one of the social subsystems, to which the role of social integration is assigned. It is the most powerful means of social control, it means, the most powerful means to integrate, regulate and determine social behaviour. However, Parsons and other functionalist authors believe that Law has a limited sense, since it is aimed at correcting the so-called “deviant behaviour” and how the Law works against them.

According to Arnaud and Fariñas, based on the theories of Durkheim, Parsons and Merton, there are two ways to explain deviant behaviour in society: (i) the one linked to the functional conception of society, where social control appears as an *ex post* reaction to a rule violation; in other words, it is a type of control coercive and *a posteriori*, (ii) the one that extends the deflection as the result of a social process of social labelling or stigmatization, where the deviation is a response to social control and it is precisely the social control that generates *ex ante* and, therefore, it labels *a priori* a behaviour as a deviant behaviour.<sup>213</sup>

Law is not the only means of social control, sociologists quote other means: education, religion, public opinion, the group’s common ideology, economics, and as already mentioned, Law. All these means are characterized for creating a social pressure to the individual, but only through the application of Law, enforcement can be obtained, known as social force. So, the social control function that Law exercises is closely linked to the functions of the legal sanctions.<sup>214</sup>

Every society contains many institutions and processes for handling disputes. Some are governmental, some are located within other institutions and groups in society. Some are adjudicatory, some proceed in other modes, arbitration, mediation, therapy, negotiation and unilateral action of various kinds. The distribution of these processes varies from society to society.<sup>215</sup>

The State as a political organization of society has the social monopoly of enforcement, enabling thus the social peace throughout the resolution of conflicts. Conflict is a phenomenon inherent to every society and the more complex the society is, the more complex the conflicts are.

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<sup>213</sup> Arnaud, André-Jean, Fariñas Dulce, María José, Op.cit. footnote No. 33, pp. 130 -132.

<sup>214</sup> These functions are: to intimidate, to repress, to repay and to rehabilitate. The first one consists of the possibility of a punishment when it is foreseen in the norm, it confirms that the sanction “goes serious”. This function is addressed to all and projected towards the future. The second one implies the act of punishing addressed directed to the transgressor, supposes the idea of “who makes it, pays it”. The third one implies the idea of satisfying the victim. Finally, the fourth and last function is typical of the legal systems of the most civilized societies, it implies the idea that the sanction must be the mechanism of social reintegration of the violator in the society. Robles, Gregorio, Op.cit, footnote No. 5, pp. 82–83, 166-167.

<sup>215</sup> Cartwright, Bliss, Galanter, Marc, Kidder, Robert, “Introduction: Litigation and Dispute Processing”, Law & Society Review, Volume 9, Number 1 / Fall 1974.

Sociology is responsible for the analysis of this function, to the extent that there is a conflicting theory “conflictualism” whose followers are known as “conflictualists”.<sup>216</sup> They place social conflict in the centre of sociological consideration arguing not only its permanent presence but also that conflict is a functional factor of the group’s life and its evolution.<sup>217</sup>

### **3.3.1 Some Authors’ Perspectives.**

#### **3.3.1.1 Marx.**

Marx was the creator of the Conflicting Theory of society, establishing the relationships between Law, State, Economy and Society. Structuring classes of society leads Marx to explain society from a conflictual perspective. The social infrastructure is dominated by the ongoing conflict between social classes, which is also reflected in the content of the law.

In capitalist society, Marx notes the existence of two social classes which are: the capitalist class which controls the power and owns the means of production and therefore their economic interests, imposing its ideology. And the working class and dispossessed that only has its workforce. The history and evolution of society is set up in Marxist theory, as the result of ongoing conflict between different economic interests defined by each social class and between the different ideologies which are based on the defense of each of those interests.

From this conflicting view of society, Marx concludes that both the Law and the State are dependent variables of the economic structure and the relationship of domination that it imposes. Law and State, therefore, are instruments of coercive power in the hands of the ruling class, through which it imposes, and transmits its ideology.<sup>218</sup>

This theory points out the positive aspects of the conflict, emphasizing its “normal” character, since it belongs to the way of being of a living and therefore dynamic society. In contrast, there is the conception that sees the conflict as something pathological, which breaks the habitual regulations and provisions, which would be properly healthy in any society.

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<sup>216</sup> From the 50’s, after two world wars, in the middle of the diverse warlike conflicts, after the processes of national liberation in diverse countries, the necessity and the interest for the study of the social conflicts is reborn, and the first sociologies of the conflict are arisen. These sociologies were inspired in fundamental authors that have developed perspective for the analysis of the conflicts (Simmel G., 1986, Marx C. 1970, Dahrendorf R. 1974, Coser L. 1967, Rex J. 1985). It begins to glimpse the conflict, which had been considered a small and exceptional form of social relation, as an intrinsic part of the social life. Manzanos Bilbao, César, Universidad del País Vasco, “El Derecho como Mecanismo de Control Frente a los Conflictos Sociales”, “Derecho y Sociedad”, (coordinadores) María José Añón, Roberto Bergalli, Manuel Calvo, Pompeu Casanova, Titant lo Blanch, Valencia, 1998, pp. 443.

<sup>217</sup> Gregorio Robles considers that Coser is the initiator of this conflictualism conception. For further information in the subject might be consulted G. Simmel, *Op.cit.* footnote No. 29.

<sup>218</sup> Arnaud, André-Jean, Fariñas Dulce, María José, *Op.cit.* footnote No. 33, pp. 70-71.

Our opinion on this matter might be somewhere in between, because we believe that conflict is actually a condition that unbalances the social peace and breaks the norms; however, we also believe it is part of a living society and helps to make a society stronger, which would be less developed if it had not some conflicts among its members. If there were no conflicts, it would be pointless the rules that regulate them. There is a well known refrain in the common law system that goes “rules were made to be broken”. We believe that the saying is an intermediate position on both points of view and that in its own nature the reason for their meaning is found.

Democracy is a way of resolving disputes through an agreement on the procedure to resolve them, any democratic system is based on the idea of consensus on how to decide in case of a conflict.<sup>219</sup> Each legal system establishes the rules under which disputes will be resolved, either by going to a judge or an arbitrator. These rules are known as procedural or adjective law rules. In turn, the law establishes the substantive rules or on the merits which sets the parameters out of which the conflict creates. In other words, the judge connects the general formula contained in the substantive law to the case, or with the specific people involved. These judges may be appointed by the parties as it is the case of arbitrators, or, in most cases, he/she is a representative of the sovereign state.

### **3.3.1.2 John Rawls.**

Rawls considers “justice as fairness”, because “it conveys the idea that the principles of justice are agreed to in an initial situation that is fair.”<sup>220</sup> He argues that of an established set of alternative, rational participants would choose two principles of justice which may be generally stated as follows: First, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others, and second, that social and economic inequalities are to be arranged to that they are, both: (i) to the greatest benefit of the least advantaged and (ii) attached to offices and positions open to all under conditions of fair equality of opportunity. These principles are regarded as being serially ordered such that equal liberty takes precedence over the others and equal opportunity takes precedence over social and economic inequalities.<sup>221</sup>

### **3.3.1.3 Felstiner, Abel and Sarat.**

Felstiner, Abel and Sarat talk about another aspect of the conflicts, which is the emergence and transformation of disputes. They consider that disputes are not things, they are social constructs. Moreover, a significant portion of any dispute exists only in the minds of the

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<sup>219</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 82–83, 168-169.

<sup>220</sup> Rawls, John, “A Theory of Justice”, The Belknap Press of Harvard University Press, 1971.

<sup>221</sup> Mentioned at, Thibaut, John; Walter, Laurens; La Tour, Stephen; Houlden Pauline, “Procedural Justice as Fairness”.

disputants.<sup>222</sup> We could not agree more with this statement. Conflicts arise sometimes only when there are rough feelings between the parties. It means, the circumstances of the relation might not change but if the feelings between the parties change, a dispute may arise.

These authors consider that, in order for disputes to emerge and remedial action to be taken, an unperceived injurious experience must be transformed into a perceived injurious experience. The next step is the transformation of a perceived injurious experience into a grievance. This occurs when a person attributes an injury to the fault of another individual or social entity. The third transformation occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for remedy. We call this communication “claiming”. A claim is transformed into a dispute when it is rejected in whole or in part. Rejection need to be expressed by words.

According to these authors, the sociology of law should pay more attention to the early stages of disputes and to the factors that determine whether naming, blaming and claiming will occur. The early stages of naming, blaming, and claiming are significant, not only because of the high attrition they reflect, but also because the range of behaviour they encompass is greater than that involved in the later stages of disputes, where institutional patterns restrict the options open to disputants. Finally, attention to naming, blaming and claiming permits a more critical look at recent efforts to improve access to justice, which is supposed to reduce the unequal distribution of advantages in society.<sup>223</sup>

Felstiner, Abel and Sarat mention the characteristics of disputes. They are subjective, unstable, reactive, complicated and incomplete:

They are subjective in the sense that transformations need not be accompanied by any observable behaviour. A disputant discusses his problem with a lawyer and consequently reappraises the behaviour of the opposing party. The disputant now believes that his opponent was not just mistaken but acted in bad faith. The content of the dispute has been transformed in the mind of the disputant.

They are unstable since transformation may be nothing more than changes in feelings, and feelings may change repeatedly. This characteristic is notable only because it differs so markedly from the conventional understanding of legal controversies. In the conventional view of disputes, the sources of claims and rejections are objective events that happened in the past. It is accepted that it may be difficult to get the facts straight, but there is rarely an awareness that the events themselves may be transformed as they are processed.

They are reactive since a dispute is a claim and a rejection. Disputes are reactive by definition, a characteristic that is readily visible when parties engage in bargaining or

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<sup>222</sup> Felstiner, William, L.F., Abel, Richard, L., Sarat Austin, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...”, *Law & Society Review*, Volume 15, Number 1, 1980-81, pp. 632.

<sup>223</sup> Felstiner, William, L.F., Abel, Richard, L., Sarat Austin, *idem.*, pp. 636-637.

litigation. But attention to transformations also reveals reactivity at the earlier stages, as individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behaviour, and expectations of a range of people, including opponents, agents, authority figures, companions and intimates.

They are complicated, since disputing is a complicated process involving ambiguous behaviour, faulty recall, uncertain norms, conflicting objectives, inconsistent values, and complex institutions.

They are incomplete, since people never fully relegate disputes to the past, never completely left bygones be bygones. There is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, colour later conflict. Furthermore, there is a continuity to disputing that may not be terminated even by formal decision. The end of one dispute may create a new grievance, as surely as a decision labels one party a loser or a liar.<sup>224</sup>

#### **3.3.1.4 Cain and Kulcsár.**

Following up with theoretical perspectives, it is interesting the five presumptions of dispute theorizing identified by Maureen Cain and Kalman Kulcsar.

Universality. Disputes, both within groups and between them, are found everywhere in human society. This presumption is made possible by two strategies: the first is to define disputes in terms of the presumption, that is to find a phenomenon which appears to be universal and then to define disputes in terms of the “highest common factor”, and can be demonstrated empirically by the two processes of appropriation<sup>225</sup> and conflation<sup>226</sup>;

Ideological Functionalism. This presumption reminds us that a conflict may be functional for a society as a whole. Also, that disputes have outcomes rather than settlements, the notion of the need for resolution is integral to the concept, as it is integral to the concept of conflict. Society is by definition ordered, a dispute is a moment of disorder, it is therefore unthinkable as a permanent condition;

Courts Should Settle Disputes. If they do not, then alternative institutions should be established to do so;

Qualitative Identity of the Parties. This assumption derives directly from the pluralist conflict theory. The differences in power are capable of being equalized: more money,

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<sup>224</sup> Felstiner, William, L.F., Abel, Richard, L., Sarat Austin, idem., pp. 636-637.

<sup>225</sup> Appropriation of real-world events to the concept of dispute takes place when the concept is deliberately expanded so as to subsume any activities in a society which a researcher may identify.

<sup>226</sup> Conflation occurs when an author starts off by discussing disputes, more or less closely defined, and then expands the discussion to cover also a range of other notions.

more knowledge, more organization, even more experience, may be given to the weaker party, and then the difference would disappear;

Comparability. This relates to the presumed universality of disputes. The need for comparability between different cultures necessitates a minimal definition which is capable of being universalized. If disputes are everywhere in society, at all times and places, then it becomes possible to compare the ways in which this phenomenon is dealt with, and to explain any differences that occur.<sup>227</sup>

### **3.3.1.5 John Thibaut, Laurens Walter, Stephen La Tour, Pauline Houlden.<sup>228</sup>**

They believe that within the legal process of the United States it is possible to describe at least five basic procedural variants which compose a simplified spectrum of modes of dispute resolution.

The first variant is the pure inquisitorial model, characterized by an activist decision-maker directly developing the facts in interaction with involved persons and then reaching and announcing a decision.<sup>229</sup> One example is the procedure of the congressional committee that interrogates witnesses in an informal proceeding almost totally controlled by its members.

The second variant, a modification of the inquisitorial system, may be called the “single investigator” model. Here a moderately activist decision-maker is assisted by an investigator whose rewards are controlled by the decision-maker and whose role definition is that of an impartial and unbiased truth-seeker. The disputants are largely restricted to furnishing requested information.

The third model may be called “double investigator” system. In this model the decision-maker is less activist than in the two prior models because he is assisted by two investigators both of whom are employed by the decision-maker to assist in reaching a just result. Each is assigned to investigate the contentions of one of two disputing parties and is required to report the facts to the decision-maker for judgment.

The fourth variant is the “adversary system” in which the decision-maker or judge is relatively passive and in which the proceedings are chiefly controlled by the disputants

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<sup>227</sup> Cain, Maureen, Kulcsar, Kalman, “Thinking Disputes: an Essay on the Origins of the Dispute Industry”. *Law & Society Review*, Volume 16, Number 1 / 1981-1982, pp. 375 – 382.

<sup>228</sup> John Thibaut. A.B. 1939, University of North Carolina; PhD 1949, Massachusetts Institute of Technology. Professor of Psychology, University of North Carolina. Laurens Walter. A.B. 1959, Davidson College; J.D. 1963, Duke University; S.J.D. 1970 Harvard University, Professor of law, University of North Carolina, Law School. Stephen La Tour. B.A. 1972, University of North Carolina. Graduate Student, University of North Carolina. Pauline Houlden, B.Sc. 1973, University of Toronto, Graduate Student, University of North Carolina.

<sup>229</sup> Mentioned at, Thibaut, John; Walter, Laurens; La Tour, Stephen; Houlden Pauline, *Op.cit.* footnote No. 221.

through advocates who represent them in an open biased way. An excellent example of this model is the federal courts.

The fifth model is bargaining, a procedure somewhat like the adversary system because it is primarily under the control of the disputants. It is different from the adversary system because disputants meet in an attempt to resolve the dispute without the intervention of any third party.<sup>230</sup>

### **3.3.2 The Functionalist and Subjective Perspectives.**

From the “functionalist” perspective, among the social functions of law, the role of conflict resolution is highlighted. Law resolves and fixes any conflicts that may disrupt the social balance and order. The Law has the mission to restore social peace and balance, when they are disturbed by conflicts of interest.

From the “subjective” perspective, the conflict is permanent in the functioning of society, it means, the social interaction is inevitably conflictive and Law does not resolve conflicts, in the functional sense where conflicts disappears from the social context, but gives them a legal treatment of potential conflicts of competing interests between the parties. Ferrari prefers to talk about the function of treatments of declared conflicts, since law “offers or imposes rules, it means, behaviour patterns inherent to the decision that suggests the conflict and the ways in which that decision can be adopted.”<sup>231</sup>

Law has not only an integrative capacity of social conflicts, but it can have a disruptive capability. That is, not only resolves conflicts but also it can produce them, for example the favourable resolution to one party can mean the beginning of a conflict to the other party being the source of the conflict which is to be resolved by a higher court.

### **3.3.3 Alternative vs. Traditional, Formal vs. Informal.**

From a purely sociological point of view, it should be noted that in recent decades, instances or extra-legal individuals involved in conflict resolution have arisen.

They are the so called “alternative methods” of conflict resolution. It means, they are individuals and institutions that compete with the institutions and individuals formally designated by the Law to resolve legal disputes. They are alternatives instances to those expressly designated by the legal system and that can take the same “formal” characteristics as those strictly legal instances.<sup>232</sup>

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<sup>230</sup> Thibaut, John; Walter, Laurens; La Tour, Stephen; Houlden Pauline, idem.

<sup>231</sup> Ferrari, Vincenzo, *Funciones del Derecho*, Traducción de J. de Lucas y Ma. J. Añon, Madrid, Debate, 1989, mentioned by Arnaud, André-Jean, Fariñas Dulce, María José, Op.cit. footnote No. 33, pp. 133.

<sup>232</sup> Arnaud, André-Jean, Fariñas Dulce, María José, idem., pp. 134-135.



We agree with the opinion of Arnaud and Fariñas in the sense that “informal” should not be confused with “alternative”. The State can recognize such informal mechanisms within the framework of the implementation of the Law and *vice versa*, there may be alternative formal mechanisms as it is the case of popular courts known as “Street Popular Committees” in South Africa during the Apartheid.<sup>233</sup>

As defined by Arnaud and Fariñas, “alternative” can be defined as “that law practice or procedure proposed or deliberately chosen by those individuals who have established a legal link between them, outside of the law regulation in force that would normally apply to that relationship”.

This can be summarized by a well known principle in Civil Law countries, the “Free Willing Parties Principle”. By informal, one understands any practice or procedure of law or procedure born from the will of the affected individuals, which is beyond the ordinary and extraordinary forms established by law in force applicable to the hypothesis in question.

The term “alternative” is a term of recent use, since its introduction by the Italian Pietro Barcellona, in the seventies, under the expression “alternative use of law”. To support his/her decision a judge can use the full range of possibilities offered by the law, in his/her role as a representative of the legitimate and democratically established national sovereignty.

USA programs in alternative dispute resolution had their origin from a campaign led at that time by the Department of Justice, in order to divert the process to informal modes of settlement, and to the mediation. This movement is closely related with maintaining a complex industrialized society, which has no great confidence in the Law, whose thinking relates directly to Japan.<sup>234</sup>

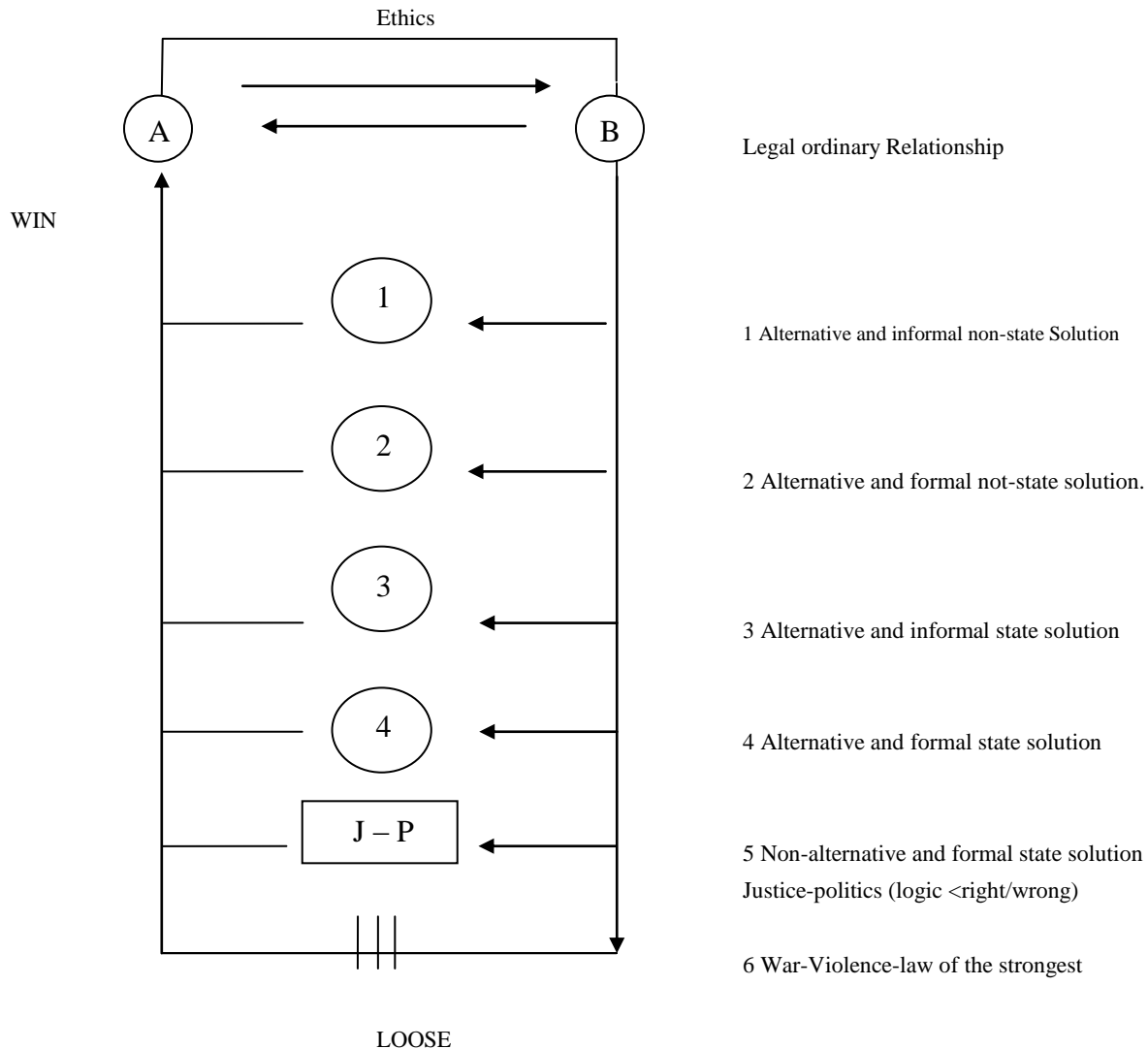
This dejudicialization movement is based on a new understanding of the conflict, taking account of its social dimension. Given the ineffectiveness of regulation by law, authorities in some countries began to realize that a local regulation, more social than strictly legal, permitted to resolve the problems of certain communities, as has happened to the favelas of Brazil or in South Africa.

These examples are intended to draw attention to the fact that there are numerous ways of settling disputes in our society beyond the law. So, intermediate solutions have appeared that combine the different characteristics of the alternative to the traditional and formal with informal, as shown in the table below by Arnaud and Fariñas.<sup>235</sup>

<sup>233</sup> Arnaud, André-Jean, Fariñas Dulce, María José, *idem.*, pp. 196.

<sup>234</sup> Arnaud, André-Jean, Fariñas Dulce, María José, *idem.*, pp. 288.

<sup>235</sup> Arnaud, André-Jean, Fariñas Dulce, María José, *idem.*, pp. 291.



The famous “return to ethics” observed by contemporary sociologists and psychologists find its place in this scheme. For lawyers the traditional usual solution is number 5, which is the closest to the use of force. At this level, the parties rarely meet satisfaction, they usually end up disappointed with justice. In the future, lawyers must replace the mentality of win/lose by finding a project for future action beyond the conflict, and hoping that each of the parties can leave the relationship feeling both “winners”.

In our view this is as diseases are to humans, sometimes eventually lead to death, but in most cases, they are phenomena that strengthen once it is overcome. These phenomena related to formal, informal, alternative and traditional can be considered as aspects of legal pluralism.<sup>236</sup>

<sup>236</sup> Legal pluralism is characterized by an apparent multiplicity of sources and solutions of Law within a legal system, this is what, in systemic terms, is described as the presence of sub-systems within the same legal system and even within the same system of Law. Arnaud, André-Jean, Fariñas Dulce, María José, idem., pp. 278 - 279.

### 3.4 Socio-Legal Theory of ADR/Business Disputes.

Vincenzo Ferrari considers that judges have certainly stimulated the sociological research and suggested certain interesting hypothesis and that their figures are an expression of an informal and alternative justice movement so called ADR, which is diffused in many countries. This movement, in present times, finds itself in full expansion, but it has brought to light a peculiar characteristic: the tendency of the non professional judges to become professionals, to render a more stable and visible role, to be informal and to give life to less formal and ritual decisions.<sup>237</sup>

Within the different branches studied by the sociology of law, it is found the sociology of procedural law, which is linked to all substantive branches, it means, criminal, labour, business, etc. Similarly, we can say that there is a sociology of arbitration, and in any case, a sociology of ADR, which is responsible for the investigation of reality, efficiency and role of these alternative dispute resolution mechanisms, as well as the influence they have in the whole society and in particular human groups, and, in the case of the present research, PEMEX.

As for the theoretical base of the sociology of ADR, we might talk on two important and transcendental authors, that might be considered the “parents” of this socio-legal branch: Lon Fuller<sup>238</sup> and Soia Mentschikoff.<sup>239</sup>

Lon Fuller, as the leading jurisprudential thinker about ADR, as well as a legal pluralist,<sup>240</sup> recognized that different kinds of disputes required different kinds of processes and that processes themselves might be limited in their appropriateness for certain human activities. For Fuller, each process of decision-making, or as he preferred to say “problem solving”, had its own logic, morality and function. He acknowledged that not all legal disputes or social problems were similarly structured. Fuller wrote that mediation worked best with dyadic conflicts, and he failed to anticipate the extensive use of mediation processes in complex multiparty disputes like environmental matters, resource allocations, mass torts, or complex commercial disputes with insurers present.<sup>241</sup>

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<sup>237</sup> Ferrari, Vincenzo, Op.cit. footnote No. 128, pp.154.

<sup>238</sup> Lon Luvois Fuller (June 15, 1902 – April 18, 1978) was a noted legal philosopher, who wrote “the Morality of the Law” in 1964, discussing the connection between law and morality. Fuller was professor of law at Harvard University for many years, and is noted in American law for his contributions to the law of contracts. His debate with H.L.A. Hart in the Harvard Law Review (vol. 71) was of significant importance for framing the modern conflict between legal positivism and natural law. Fuller was an important influence on Ronald Dworkin, who was one of his students at Harvard Law.

<sup>239</sup> Soia Mentschikoff (April 5, 1915 – June 18, 1984) was an American lawyer, law professor, and legal scholar, best known for her work in the development and drafting of the Uniform Commercial Code. She was also the first woman to teach at Harvard Law School.

<sup>240</sup> For further information on pluralism, see infra pp. 119.

<sup>241</sup> Menkel-Meadow, Carrie, Op.cit. footnote No. 16, pp. 16.

On the other hand, Fuller's jurisprudence is sufficiently protean that he recognized the existence of what we currently refer to as "mixed processes". He observed mixed models of negotiation, mediation, and arbitration with "threats" of adjudication and that multiple procedures of institutional settlement enriched the routes to social ordering and made them more flexible by various mixed forms.<sup>242</sup>

The work contributed by Fuller has been very important and somewhat prophetic, since nowadays there are hybrid models that perfectly suited to what he said. These hybrid models combine the structure of negotiation, mediation and arbitration to attempt to perform wide variety of functions, from relationship reorientation to dispute settlement to conflict resolution to administrative rulemaking and public policy decision-making.

Fuller's work had also significant contributions in terms of "ADR moralities". His opinion was that "mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract. The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interest of both parties, while procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favour."<sup>243</sup>

Lon Fuller, was not the only parent of ADR process integrity. Soia Mentschikoff, was one of the first women to leave a deep imprint on legal institutions, who also argued for the particular strengths of non-adjudicative forms of dispute resolution. She noted the procedural analogies of dispute resolution to the substantive formulations of "common usage" and "reasonable practice, trade, or custom". For her, arbitration was an opportunity for those within an industry to self-govern and to find solutions that meet their specific needs, instead of some generalized interests.<sup>244</sup> Mentschikoff noted a variety of factors that would determine not only if commercial arbitration was used at all, but what form it would take. Different issues, like the need for rapid price information, foreign trade and resale, or the quality assessment of delivered goods, militated in favour of or against particular kind of ADR. For Mentschikoff, arbitration clearly justified itself primarily when particularized expertise was required to be exercised.

Mentschikoff can also be seen as a student of process integrity and variability in her detailed historical and empirical description of differences within industries and types of arbitrations.

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<sup>242</sup> Menkel-Meadow, Carrie, *idem.*, pp. 18.

<sup>243</sup> Fuller, Lon L., "Collective Bargaining and the Arbitrator", in *Collective Bargaining and the Arbitrator's Role: Proceedings of the Fifteenth Annual meeting National Academy of Arbitrators* 29, Mark L. Kahn, ed., 1962.

<sup>244</sup> Mentschikoff, Soia, "the Significance of Arbitration - A Preliminary Inquiry", 17 *Law & Contemp., Probs.* 698, 710, 1952.

Sharing Fuller's theories, and returning to the first idea mentioned of this author's theory, we agree that one cannot generalize and think that all commercial disputes will be resolved in the same manner. We should take into account the characteristic elements of each dispute to determine the most appropriate mechanism. Within these elements we find the participants, the subject of the dispute, the amount on dispute and the socio-legal consequences. So well, within the ADR theories, we find a mainstream referred to investment disputes, which is in fact the object of the present research, reason why we will mention next some theoretical ideas.

### **3.4.1 ADR in Investment Disputes.**

International arbitration between investors and states was born as a substitute for the legal regimes of capitulations as well as the diplomatic protection of foreigners. The decolonization process that followed the Second World War took place in an international environment where the traditional European colonial powers lost much of their international power and became less able to impose capitulations.<sup>245</sup>

Investment Conflicts usually occur between two parties that, due to their nature, are not considered balanced, since one is usually a host investment state and the other is a multinational company that decides to invest in a sector industry of that host state. Normally, host states are developing countries that, due to the fact they do not have the right technology or financing sources, they decide to contract with foreign companies. The object of the contracts is mainly construction projects such as public works and the exploitation of natural resources.

The mechanisms for resolving conflicts that arise between these parties, are foreseen in both, domestic legislation of each host country as well as in various international treaties. There are bilateral investment treaties that provide rules for the case of conflicts, which have had great growth and acceptance among the countries involved. In fact, it is already speaking of the development of a "multilateral international investment law" based on "global administrative law" principles.<sup>246</sup> However, there is a realization amongst some arbitrators that a degree of retrenchment is required, so that host countries continue to accept the legitimacy of this process. The balance between the interest of investors and the interest of host countries in pursuing legitimate regulatory aims must be reached. The problem lies with the first generation of the well known Bilateral Investment Treaties or simply BITs<sup>247</sup> and their exclusive investor protection orientation. They need replacing

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<sup>245</sup> Fountura Costa, José Augusto, Comparing WTO Panelists and ICSID Arbitrators. *The Creation of International Legal Fields* (May 5, 2011). *Oñati Socio-Legal Series*, Vol. 1, No. 4, 2011.

<sup>246</sup> Muchlinski, Peter, *Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order"*, *Oñati Socio-Legal Series*, v. 1, n. 4 (2011) – *Socio-Legal Aspects of Adjudication of International Economic Disputes*. *Oñati International Institute for the Sociology of Law*, Instituto Internacional de Sociología Jurídica de Oñati, pp. 21.

<sup>247</sup> A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. This type of investment is called foreign

with more socially balanced agreements that recognize the highly sensitive interaction of public and private interests that foreign investment raises.

Particularly, as commented by Gus Van Harten, Nafta's investment regime should be reformed by encouraging foreign investment while affording appropriate policy space for governments to develop and regulate their economies in a sustainable manner and ensuring equitable governance of investment disputes such that foreign investors are not privileged, procedurally or substantively, over domestic investors and citizens.<sup>248</sup>

The distinctive feature of many BITs is that they allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could have recourse to international arbitration, often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes), rather than suing the host State in its own courts.

The ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) with over one hundred and forty members States. The primary purpose of the ICSID is to provide facilities for conciliation and arbitration of international investment disputes.<sup>249</sup> While PEMEX has not been part of this arbitration centre, we must contemplate the possibility of a future intervention request, given the positive results it has had in this type of procedure.

According to statistics published by the ICSID, 4% of the cases have emerged from conflicts arising out from the NAFTA, 5% of the conflicts have an Involved Party State from North America (Mexico, USA, Canada) and 25% cases have had a subject matter on "Oil & Gas and Mining" and 13% on "Electric Power & Other Energy". Finally, 23% of the arbitrators or conciliators have had a nationality of the countries belonging to NAFTA.<sup>250</sup>

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direct investment (FDI). BITs are established through trade pacts. A nineteenth-century forerunner of the BIT is the friendship, commerce, and navigation treaty (FCN). Most BITs grant investments made by an investor of one Contracting State in the territory of the other a number of guarantees, which typically include fair and equitable treatment, protection from expropriation, free transfer of means and full protection and security.

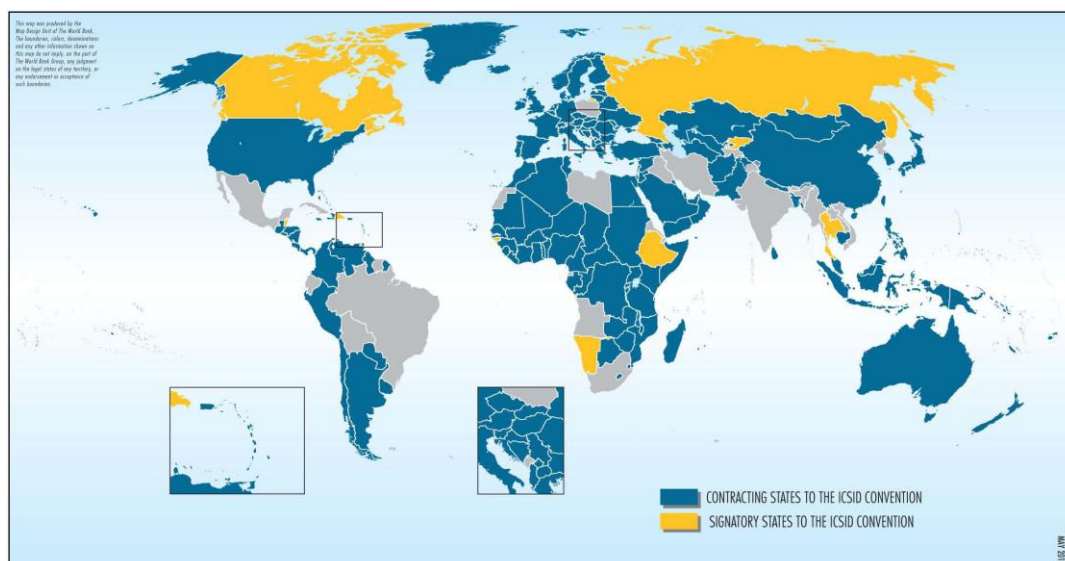
<sup>248</sup> Harten, Gus Van, "Reforming the NAFTA Investment Regime", *Future of North American Trade Policy: Lesson from NAFTA*, Pardee Center Task Force Report, November 2009.

<sup>249</sup> The ICSID does not conciliate or arbitrate disputes; it provides the institutional and procedural framework for independent conciliation commission and arbitral tribunals constituted in each case to resolve the dispute. The ICSID has two sets of procedural rules that may govern the initiation and conduct of proceedings under its auspices. These are: (i) the ICSID Convention, Regulations and Rules; and (ii) the ICSID Additional Facility Rules. See [http://icsid.worldbank.org/ICSID/ICSID/AboutICSID\\_Home.jsp](http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp)

<sup>250</sup> <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>



Below there is a map of the ICSID Contracting States and Other Signatories to the ICSID Convention as of June 30, 2011.<sup>251</sup>



Most of this kind of arbitrations are associated with sovereign immunity which, as commented by Tom Carbonneau, although arbitration may have attenuated the difficulties, it has not eradicated the problem.<sup>252</sup> Sovereign states have moved increasingly into areas of trade and commerce which were once left to private corporations. Despite the trend to “privatization”, which is extending to the formerly monolithic countries of Eastern Europe, the state is likely to remain an important player in international commerce. It is sometimes said that the immunity of a state forms part of its sovereign dignity. However, one might prefer to agree with a well-known English judge who said: “it is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it.”<sup>253</sup>

The main importance of addressing the issue of this type of arbitration is that, as discussed in Chapter V, arbitrations where PEMEX has participated belong to this type. It is important to recognize that, foreign investment in Latin America's energy sector has been significant over a period of several decades. For many years the typical focus of investor interest was the Oil & Gas reserves of a few countries. Important Oil & Gas discoveries were made in Venezuela in the 1930s. Mexico had proven Oil & Gas resources even earlier. In 1972 oil fields were discovered in Ecuador and in Bolivia gas reserves were discovered in commercial quantities in the mid 1970s. In the 1990s, a more positive

<sup>251</sup><http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English><sup>21</sup>

<sup>252</sup> Carbonneau, Tom, "A Definition of and Perspective Upon the Lex Mercatoria Debate", *Lex Mercatoria and Arbitration*, Revised Edition, Juris Publishing, Kluwer Law International, 1998, pp. 11.

<sup>253</sup> Lord Denning in *Rahimtoola v. the Nizam of Hyderabad* (1958) A.C. 379, 418. Redfern, Alan and Hunter Martin, *Op.cit.* footnote No. 77, pp. 45.



attitude to foreign investment in the development of these resources became evident in all countries except Mexico.<sup>254</sup>

This point is closely related the concept of legal culture, fully explained later on in this paper. By now, it is worth mentioning that according to Valentina Sara Vadi, a survey of the relevant investor-state arbitrations shows that international investment law has not yet developed any institutional machinery for the protection of cultural diversity through investment dispute settlement. After all, international investment law is not intended to protect cultural diversity. However, in recent years, a jurisprudential trend has emerged which not only takes cultural diversity into consideration, but strikes an appropriate balance between the different interests concerned.<sup>255</sup>

### 3.4.2 Investment Disputes Arbitrators.

Although we have spoken in chapter II and we will in chapter IV on the role of arbitrators, mediators and anyone who resolves a dispute as a third party or at least makes an opinion about it, we should make a brief mention now about those specifically involved in investment arbitration or mediation.

In this regard, it is important to note that established by José Augusto Fontoura, an expert in investment disputes. He did an interesting comparison between people who were appointed as panellists in the disputes settlement system (DSS) of the World Trade Organization (WTO)<sup>256</sup> and as arbitrators and members of the ad-hoc committees of the International Centre of Investment Dispute Settlement (ICSID).<sup>257</sup>

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<sup>254</sup> Cameron, Peter D, “International Energy Investment Law. The Pursuit of Stability”, Oxford University Press, 2010, pp. 237.

<sup>255</sup> Vadi considers that the disparity between international cultural law and international economic law is particularly evident in how their disputes are settled. Because international cultural law is still in its infancy, it presents embryonic features and lacks a dispute settlement mechanism. The proposals to establish a World Heritage Court for the settlement of disputes with cultural elements have not been successful. Many political considerations oppose the establishment of such a dispute settlement mechanism. Vadi, Valentina Sara, “Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Law”, *Oñati Socio-Legal Series*, V. 1, n. 4 (2011), *Oñati International Institute for the Sociology of Law*, *Instituto Internacional de Sociología Jurídica de Oñati*.

<sup>256</sup> The WTO is the only international body dealing with the rules governing trade between countries. Its base is the WTO agreements, which are the basic legal rules of international trade and trade policies. The agreements have three main objectives: (i) to help trade flow as freely as possible, (ii) to gradually achieve further liberalization through negotiation, and (iii) to establish an impartial mechanism for disputes settlement. All WTO Agreements are inspired by several simple and fundamental principles that shape the multilateral trading system. The principles include: non-discrimination (the “most favored nation” treatment and “national” treatment), freer trade, predictable policies, promoting competition and special provisions for less developed countries. Whereas the GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, inventions, creations, designs and models (intellectual property). The WTO is based in Geneva, Switzerland, it has 131 member countries (until April 1997), with a secretariat staff of 500 people and its general direction is headed by Mr. Renato Ruggiero.

<sup>257</sup> Fontoura Costa, José Augusto, “Comparing WTO Panelists and ICSID Arbitrators. The Creation of International Legal Fields”, May 5, 2011, *Oñati Socio-Legal Series*, Vol. 1, No. 4, 2011.

Fontoura considers that though both DSS are part of a discernible international legal system governing economic issues, they have several differences regarding their scope, structure and functioning, as well as historical origins. He states that repeated nominations of the same person are far more common among ICSID arbitrators than among WTO panellists. His analysis includes statistics on who nominates the arbitrator as well as the different degrees of institutionalization. He concludes also that the number of people who were nominated in both institutions was very narrow.

The purpose of bringing Fontoura's work is to highlight the importance of being an arbitrator or mediator in those conflicts resolved by the WTO or ICSID panels or arbitrators. They form part of a small and specialized group of lawyers, who have won international reputation on resolving this kind of cases. They have different backgrounds belonging to the government, the academia and the private sector, mainly from law firms.

International arbitrations cannot be organized in the same way as those of domestic nature. The sanctions behind the WTO or ICSID are not dealt with in the same way as in criminal convictions or civil judgments. Due to sovereign immunities from jurisdiction and enforcement it is not easy to ensure the payment of compensation by states. Therefore, the role of investment arbitrators is to offer technical legitimacy in each and every case. Consequently, there is a great need for arbitrators to be technically qualified and to give support to a discourse of fairness and rectitude.

According to Karl-Heinz Böckstiegel, if states enterprises agree to arbitration, there is a wide scale of kinds of arbitration from which they may choose. First, as in contract negotiations between private companies, state enterprises seem also to have a preference for trying to choose a national arbitration machinery in their own country. The second most mentioned kind of arbitration in relation to state enterprises is ad-hoc arbitration.<sup>258</sup>

### **3.4.3 Oil & Gas International Arbitration Leading Cases.**

There are some Oil & Gas arbitration cases that have marked a before-and-after line. These arbitrations have been relevant in the history of the Oil & Gas ADR due to their political economic and social implication. Worth mentioning are those cases of the 70s which are known as the "the trilogy of the Lebanese Nationalization". Also these cases have set precedent on the following topics for what they have been considered "leading cases" in the Oil & Gas arbitration world: cases where one party is a state and the other is a private company; nationalization of oil concession agreements; the decision of the arbitral tribunal to decide the applicable law; the limits of international public policy; the development of the delocalisation theory and the doctrine of state immunity;<sup>259</sup> the seat theory and the need

<sup>258</sup> Böckstiegel, Karl-Heinz, "Arbitration and State Enterprises", Kluwer Law and Taxation Publishers, pp. 20.

<sup>259</sup> According to Redfern and Hunter, if the delocalization theory owed its origins to the doctrine of state immunity, this is not the way in which it has developed. The theory is now said to apply to all international commercial arbitrations, irrespective of whether or not a state is a party. In support of this view, it is pointed out that the place in which an international commercial arbitration is held is often a matter of chance. The

for an effective award<sup>260</sup>; the competence/competence doctrine;<sup>261</sup> amongst others. Now, there is a brief summary of the Libyan cases.

#### **3.4.3.1 The Aramco Arbitration (1958).**

This was an arbitration between the Kingdom of Saudi Arabia and the Arabian American Oil Company (Aramco), held in Geneva under an ad-hoc submission agreement concluded in 1955.<sup>262</sup> Aramco held an oil concession agreement, granted by Saudi Arabia in 1933. In 1954 the Government of Saudi Arabia concluded an agreement with the late Aristotle Onassis and his company, Saudi Arabian Maritime Tankers, Ltd., under which the company was given 30 years “right of priority” for the transport of Saudi Arabian Oil. The point in issue was the conflict between this agreement and Aramco’s concession agreement, which gave Aramco the area in Saudi Arabia. The government took the position that it could withdraw from arbitration any act done by it in the exercise of its sovereign power.<sup>263</sup> The arbitral tribunal, by a majority, determined the case in favour of Aramco.<sup>264</sup>

#### **3.4.3.2 The BP Arbitration (1973).**

choice of place of arbitration by the parties, or by the arbitral institution, is generally guided by the desire to find a country which is neutral, (being the home country of neither party), and which is convenient, (being well served by modern communications). Redfern, Alan and Hunter Martin, *Op.cit.* footnote No. 77, pp. 84-85.

<sup>260</sup> The problem is that an international arbitral tribunal is only free of the constraints of local law if the local law itself allows it to be so. Most systems of law are unwilling to do this. Almost all states seek in some measure to control arbitrations conducted on their territory. Parties who allow an arbitral tribunal to ignore a mandatory requirement of the local law run the risk of obtaining an award which may be set aside under the local law or refused recognition and enforcement under the New York Convention. Redfern, Alan and Hunter Martin, *idem.*, pp. 88.

<sup>261</sup> According to this doctrine, the arbitral tribunal has power to decide on its own jurisdiction. The autonomy of the arbitration clause was discussed during the preparation of the Model Law. An independent or autonomous arbitration clause gives an arbitral tribunal a basis to decide on its own jurisdiction, even if it is alleged that the main contract has been terminated by performance or by some intervening event. Redfern, Alan and Hunter Martin, *idem.*, pp. 176-177.

<sup>262</sup> *Arabian American Oil Company Ltd. v. The Government of the Libyan Arab Republic*, (1963). Decision of 23 August 1958, 27 *International Legal Report* 117, 1963.

<sup>263</sup> Bishop, Doak, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, International Energy & Mineral Arbitration, Rocky Mountain Mineral Law Foundation, Houston, USA, p. 2.

<sup>264</sup> The arbitral tribunal addressed the problem of what law was to govern the arbitration itself in the following terms: “Although the present arbitration was instituted, not between states, but between a State and a private American corporation, the Arbitration Tribunal is not of the opinion that the law of its seat should be applied to the arbitration. Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State... For these reasons, the Tribunal finds that the law of Geneva cannot be applied to the present arbitration. It follows that the arbitration, as such, can only be governed by international law... In considering that the arbitration, as such, is governed by the law of Nations, the Arbitration Tribunal does not intend to apply this Law to the merits of the dispute, since the law governing the merits is independent of the law governing the arbitration itself. Redfern, Alan and Hunter Martin, *Op.cit.* footnote No. 77, pp. 84-85.

This arbitration was between a private company, British Petroleum versus the Government of the Libyan Arab Republic, in 1973. The issue of this arbitration was the recognition of the need for the effectiveness of an arbitration award.<sup>265</sup> The arbitrator stated that within the limits of international law, the judicial or executive authorities in each jurisdiction do, as a matter both of fact and of law, impose limitations on the sovereign immunity of other states within such jurisdictions. The arbitrator decided that, by agreeing to arbitration, the parties must have intended an effective remedy, and an award founded on the procedural law of a specific legal system is more likely to be effective than one lacking nationality, such as an arbitration proceeding governed by international law.<sup>266</sup>

### **3.4.3.3 The TEXACO or TOPCO Arbitration (1977).**

This arbitration was between a private company, Texas Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company versus the Government of the Libyan Arab Republic, in 1978.<sup>267</sup> This arbitration arose out of the nationalization by the Libyan Government of oil concessions granted by Libya to various foreign companies. The concession had been granted to both companies before mentioned. The sole arbitrator, again sitting in Geneva, considered at some length what system of law was applicable to the arbitration. He stated that, in determining this question, two solutions were theoretically possible. The first adopted in the Sapphire arbitration,<sup>268</sup> was to submit the arbitration to a given national law, which would generally but not necessarily be that of the place where it was held. The second solution, adopted in the Aramco arbitration, was to consider this arbitration as being directly governed by international law. This solution was persuasive in the Texaco arbitration because of the “respect for sovereignty” and because if the “parties intended from the outside to remove their differences from the jurisdiction of the local courts the provision for the appointment of a sole arbitrator by the President of the ICJ<sup>269</sup> strengthens the presumption that the parties intended that any possible arbitration between them should be governed by international law. According to the Texaco award, an international arbitration is subject to a system of law, but not to any national system. Instead, it is subject to international law and this law lends its authority to the recognition and enforcement of the award, so long as the award does not infringe any requirement of international public policy.<sup>270</sup> The arbitrator in the Texaco arbitration indicated that he could resolve any procedural inadequacies by his own direction, because the procedural rules which he had adopted provided that in so far as he was competent to do so.<sup>271</sup>

<sup>265</sup> British petroleum Company (Libya) Ltd. v. The Government of the Libyan Arab Republic, (1980) V Yearbook Commercial Arbitration, pp. 143, 147.

<sup>266</sup> Bishop, Doak, Op.cit. footnote No. 263, p. 11.

<sup>267</sup> Texas Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company versus the Government of the Libyan Arab Republic. Award of 19 January 1977, 17 I.L.M. 3 (1978), 4 Y.B. Com. Arb. 177 (1979).

<sup>268</sup> Sapphire International Petroleum Ltd. v. The National Iranian Oil Company (1964) 13 I.C.L.Q. 1011; (1964) *Annuaire Suisse Droit Int.*, p. 173.

<sup>269</sup> International Court of Justice.

<sup>270</sup> Well known as l'ordre public international.

<sup>271</sup> Texas Overseas Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic, (1978) 17 I.L.M. 3; (1979) IV Yearbook Commercial Arbitration, pp. 177.

#### 3.4.3.4 The LIAMCO Arbitration (1977).

This arbitration was between a private company, Libyan American Oil Company (LIAMCO) versus the Government of the Libyan Arab Republic, in 1977.<sup>272</sup> The Libyan Government held that it was widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the state of the contract in which it is inserted and continues in force even after the termination. The arbitrator rationalized this decision by finding it was the intention of the parties and is a basic condition for creating a favourable climate for foreign investment. This was also an ad hoc arbitration.<sup>273</sup>

#### 3.4.3.5 The AMINOIL Arbitration (1984).

This arbitration was between a private company, American Independent Oil Company (AMINOIL) versus the Government of the State of Kuwait, in 1984.<sup>274</sup> The Government of Kuwait argued, that a sub-species of these disputes has generated customary rule valid for the oil industry, a *lex petrolea* that was in some sort a particular branch of a general universal *lex mercatoria*. In the context of that very narrow claim, the contention was rejected, but as we mentioned below, these published awards have created the beginnings of a real *lex petrolea* that is instructive for the international Oil & Gas industry.<sup>275</sup>

#### 3.4.3.6 The NIOC Arbitration (1986).

This arbitration was between a private company, National Iranian Oil Company (NIOC) versus Elf Aquitaine Iran, in 1986.<sup>276</sup> NIOC attacked the jurisdiction of a sole arbitrator in an ad-hoc case because the Special Committee established by Iran's Single Article Act of 1980 rules that the 1966 contract was null and void *ab initio*. Rejecting this claim, the arbitrator noted that Article 41 of the Exploration and Production Contract provided that in the absence of agreement by the parties, the arbitrator determines the procedure for the arbitration. The same article also provided that the arbitrator was to decide any dispute based on equity and generally recognized principles of law. Relying in part on this, the arbitrator held that it is a fundamental principle in international arbitration that an arbitrator has competence over the competence. Based on equity and principles of international law, the arbitrator decided, in this ad-hoc proceeding, that was competent to decide on his own jurisdiction.<sup>277</sup>

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<sup>272</sup> Libyan American Oil Company (LIAMCO) v. the Government of the Libyan Arab Republic. Award of 12 April 1977, 6 Y.B. Com. Arb. 89 (1981).

<sup>273</sup> Bishop, Doak, Op.cit. footnote No. 263, p. 2-1.

<sup>274</sup> Government of the State of Kuwait v. American Independent Oil Co. (AMINOIL), award of 24 May 1982, 21 International Legal Materials 976, 1036 (1982), 9 Yearbook Commercial Arbitration 71, 87 (1984).

<sup>275</sup> Bishop, Doak, Op.cit. footnote No. 263, p. 2-5.

<sup>276</sup> National Iranian Oil Company (NIOC) versus Elf Aquitaine Iran. Preliminary award of 14 January 1982, 11 Y.B. Com. Arb. 97 (1986).

<sup>277</sup> Bishop, Doak, Op.cit. footnote No. 263, p. 2-6.

### 3.4.4 Globalization and ADR.

One might think that globalization is something new; however, as well as Vincenzo Ferrari says, it is a recurring phenomenon in the centuries, on the facts and ideas. The Roman Empire was already a global entity. There was already the exchange of goods without borders, and mass migrations of the poor to affluent areas. Also these potentially global dimensions were found during the Middle Ages, followed by the silk market and the conquests of the Americas, the colonialism. In recent decades, we have experienced a technological phenomenon, considered as an information revolution that has allowed the borders disappear and shortened the time of communication.<sup>278</sup> For its part, Law has had a parallel growth to the economic activity and has had to adapt itself to these swings of the trade openness in the world.

So well, globalization has resulted from this international trade, which has brought as a result that a similar lifestyle is imposed from one extreme to another in the world, spread by the media, which has been known as “world culture”. In the history of mankind, ever own practices were imposed as quickly as universal models.<sup>279</sup> This phenomenon has been aimed at a group of people who are part of a universal group of consumers, who are neither tribes, nor citizens, all of them had potential customers, but only one race of men and women who are consumers, in other words, the American world culture known as “McWorld culture.”<sup>280</sup>

Thus, as a result of this, small and medium enterprises were weakened by large multinational corporations, also known as “global companies”<sup>281</sup> which are companies that throughout the relocation of factories and ever-increasing production, seek maximum benefits. This obsession leads them to produce where labour costs are lower and sell where living standards are higher. Geographically, this economic division is located in the southern countries that are attractive for the production and in the north that are more attractive to buy and sell products.

Vincenzo Ferrari considers that “the current framework is commonly described in terms of globalization, a word that has become, more than popular, almost magical: a key that opens all doors in the scientific and political discussion. Like all the current views, this must be

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<sup>278</sup> Ferrari, Vincenzo, Op.cit. footnote No. 128, pp. 190 - 196.

<sup>279</sup> Ramonet, Ignacio; “Globalización, Cultura y Democracia”, Elbaz, Mikhaël and Helly Denise (directors), “Globalización, Ciudadanía y Multiculturalismo”, Editorial Maristán, Granada, España, 2002, pp. 45-46.

<sup>280</sup> Barber, Benjamin B; “Hacia una Sociedad Universal de Consumidores. Cultura McWorld contra democracia”, Elbaz, Mikhaël and Helly Denise (directors), “Globalización, Ciudadanía y Multiculturalismo”, Editorial Maristán, Granada, España, 2002, pp. 235-246.

<sup>281</sup> We share the view of Ignacio Ramonet, who believes that far from being world-wide these companies, they are “triadic”, it means, that are essentially involved in the three dominant poles of the economy in the world: North America, Western Europe and the Asia Pacific region. He considers that the global economy leads, paradoxically, a fracture of the planet between these three poles increasingly integrated and the other countries (in particular, black African) which are poorer, more marginalized and even more excluded from international trade and technological modernization. Ramonet, Ignacio; Op.cit. footnote No. 279, pp. 47-48.



neither accepted without reservation nor rejected for intellectual snobbery, but critically examined”.<sup>282</sup>

The birth of global business has brought benefits and harms for all countries participating in the international market, mainly those related to employment and economic development. However, two trends have been created which faced each other, the first one to support the development of this globalization and the second, in contrast, attacking this new movement. The latter called globophobia. In fact, while the phenomenon of globalization began over twenty years, there is now a phenomenon of local sentiment, led by those with an ideology of stubborn and isolated resistance. Coincidentally, this local concept has been also globalized.<sup>283</sup>

Our point of view is that it is a movement that has resulted from the industrial development of developed countries and the arduous need for better products in developing countries. As every change, it has benefits for certain sectors and harm to others. For Mexico, which has been an active participant in this globalization through NAFTA, it has suffered, sometimes bloody, the consequences of trade liberalization.<sup>284</sup> However, we believe it is a necessary move if we do not want to suffer in the future, the consequences of a productive and economic backwardness.

The world culture before mentioned concerns not only political and economic models, but also legal ones. The most important challenge facing the jurist today is the globalization of the economy. In a globalized economy, it is thus no longer appropriate to speak of a clash of legal cultures. International Commercial arbitrations appeared as a judicial answer to the globalization of the economy in relation to the resolution of international commercial conflicts. Today, more than ever, businessmen demand very experienced arbitrators who, through their professionalism, are capable of deciding beyond the cultural barriers of the parties.<sup>285</sup>

The opinion indicated above can be applied to anyone of the ADR and the situation becomes then more complex when the ADR is considered an international mechanism. We could be in the presence of diverse legal systems, participants of diverse nationalities, diverse languages, diverse involved religions, diverse forms of negotiating and making commerce, diverse forms of hiring, diverse forms to bring controversies to an end, diverse forms to comply with the decision that ends the controversy, amongst others. Definitively, in these cases, we are in the presence of a multicultural phenomenon, which will have to be

<sup>282</sup> Ferrari, Vincenzo, Op.cit. footnote No. 128, pp. 190.

<sup>283</sup> Herzfeld, Michael; “La Revancha de la Comunidad Local: la Globalización de la Heterogeneidad Local”, Elbaz, Mikhaël and Helly Denise (directors), “Globalización, Ciudadanía y Multiculturalismo”, Editorial Maristán, Granada, España, 2002, pp. 85-92.

<sup>284</sup> Mexico has escaped bankruptcy in 1994, thanks to the grant of a massive international aid of more than 50,000 million dollars (of which 20,000 came from USA), the most important aid ever given to a country.

<sup>285</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 168.



considered by the participants in the ADR procedure.<sup>286</sup> In other words, the cultural approach to the conduct or administration of international ADR is not the consequence of notions or ideas exclusively fashioned by a one group, geographically localized in this or that country or group of countries, nor does it trace back its origins to any specific or single legal tradition. Mr. Grigera Naón, with whom we agree, considers that it is not correct to assume that the multicultural features will necessarily lead to arbitral proceedings unrelated to the principles and notions of a specific national legal system. Though the approach is multicultural, the actual way of handling the dispute may in the end not necessarily be so. Each case needs evaluation on the basis of its own characteristics and the choices made by the parties.<sup>287</sup>

Mr. Bernardo Cremades, who is also a recognized authority in the field, considers that at one time, the nature of international commercial arbitration was that of a craft mastered by a small minority, where there were only a few law firms which represented parties in arbitration proceedings. In contrast today, great economies battles are fought and a true arbitration industry has emerged.<sup>288</sup> Mr. Cremades mentions that voices had been raised against international commercial arbitration as a threat to the state's sovereignty.<sup>289</sup>

Thus, a conclusion might be reached, ADR proceedings should be tailor-made to properly take into account the cultural peculiarities of the dispute at stake. Following this idea, Jan Paulsson thinks that each international commercial arbitration case should be considered as a micro-cultural environment which is to be approached, for the purpose of organizing the conduct of arbitral proceedings, as a *sui generis* situation with its own needs and characteristics.<sup>290</sup>

### 3.4.5 ADR as a Transnational New Legal Order.

The growth of ADR worldwide has undoubtedly led to the construction of a transnational legal order, as recognized by Yves Dezalay and Bryant G. Garth. They believe that over the past twenty-five to thirty years, international commercial arbitration has become big legal business, as the accepted method for resolving international disputes. Its success is reflected in the arbitrations of high profile disputes, such as those arising out of the

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<sup>286</sup> It is worth mentioning here that the majority of the Arbitration and Mediation Rules are always the results from efforts based on a multicultural and multinational approach regarding dispute resolution. Grigera Naon, considers that it may be said without exaggeration that the ICC arbitration system is now the only one that is truly global and universal in its organization and scope. Grigera Naón, Horacio, "Latin American Arbitration Culture and the ICC Arbitration System"; "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 138. We do not personally agree with such an statement, we consider there are many arbitral institutions which are nowadays considered as international service providers and that some advantages can be highlighted before the ICC.

<sup>287</sup> Grigera Naón, Horacio, *idem.*, pp. 118.

<sup>288</sup> Cremades, M. Bernardo, *Op.cit.* footnote No. 71, pp. 147.

<sup>289</sup> Cremades, M. Bernardo, *idem.*, pp. 167.

<sup>290</sup> Paulsson, Jan, "Differing Approaches to International Arbitration Procedures", Fall 1996, ADR Currents, 17 at 19.

nationalization of oil concessions in the 1970s and 1980s,<sup>291</sup> huge international constructions projects such as the tunnel under the English Channel, and international incidents like the French sinking of the Rainbow Warrior on its Greenpeace mission. Success is also evident in the tremendous growth since the late 1970s in the number of arbitration centres, arbitrators and arbitrations.<sup>292</sup>

The growth of the arbitration market is also evident in the competition that can be seen among different national approaches and centres, as well as from the legislative point of view. Thus, within Europe, several countries adapted their legislations to new arbitrations laws, such as the case of England in 1979, France in 1981, Belgium in 1985, the Netherlands in 1986, and Switzerland in 1989. The world experienced a “regulatory competition” where all the countries in the world stated being a part of. Mexico has not been the exception since legislative changes have been present in 1989 and 1993.<sup>293</sup>

Law firms and universities have also participated in this new arbitration and mediation era. Universities have included into their list of courses the subject of ADR as an independent course. Lawyers are little by little more involved in this kind of dispute settlement. The work of arbitrators is becoming, as considered by Dezalay and Garth, a rather glamorous and well-paid activity associated with nice places, like Paris or Geneva, and a first-class lifestyle. Only a very selected and elite group of individuals is able to serve as international arbitrators. They are selected for their “virtue”: judgment, neutrality and expertise. In more sociological terms, the symbolic capital acquired through a career of public service or scholarship is translated into a substantial cash value in international arbitration.<sup>294</sup> We completely agree with this statement, with the only observation that not all the arbitrators can be considered “virtuous”.

Whitmore Gray also recognizes an “international culture” but in order to understand it, first, has to be determined what “an international arbitration culture” is. To understand this term, we must consider how various techniques of dispute resolution are working together in the multicultural international context. Arbitrators in international arbitrations separate themselves and their arbitrations from the particularities of national systems. Courts have developed special international standards in their assistance and enforcement roles in connection with international arbitrations.<sup>295</sup>

Finally, we share the affirmation of Tang Houzhi, in the sense that there is an expanding culture that favours combining arbitration with mediation in the world. This culture has been in existence in the East for a long time and is now expanding to the West and other

<sup>291</sup> We briefly mention this arbitrations in *supra* pp. 109.

<sup>292</sup> Dezalay, Yves, Garth G. Bryant, “Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order”, the University of Chicago Press, Chicago & London, pp.6.

<sup>293</sup> See *infra* pp. 220.

<sup>294</sup> Dezalay, Yves, Garth G. Bryant, *Op.cit.* footnote No. 292, pp.6.

<sup>295</sup> Gray, Whitmore, “Is There a Growing International Arbitration Culture?”, *International Dispute Resolution: Towards an International Arbitration Culture*. International Council for Commercial Arbitration, International Bureau of the Permanent Court of Arbitration, the Hague.

parts of the world. In recent years, this culture has developed to favour combining arbitration with other ADR procedures as well. Actually, this culture exists not only in the Common Law system countries but also in the Civil Law system countries.<sup>296</sup> Unfortunately, Mexico is not a good example yet.

### **3.4.6 Arbitration, Lex Mercatoria and Lex Petrolea.**

When talking about globalization and a new legal system in the world of ADR, we must speak of Lex Mercatoria, Lex Petrolea and the relationship they have with these dispute resolution mechanisms.

Lex Mercatoria is the Latin expression for a body of trading principles used by merchants throughout Europe in the medieval period. Meaning literally “merchant law”, it evolved as a system of custom and best practice, which was enforced throughout a system of merchant courts along the main trade routes. It functioned as the international law of commerce, emphasizing contractual freedom, alienability of property, while shunning legal technicalities and deciding cases *ex aequo et bono*.<sup>297</sup> International commercial law today owes some of its fundamental principles to Lex Mercatoria as it was developed in the medieval ages. This includes choice of arbitration institutions, procedures, applicable law and arbitrators, and the goal to reflect customs, usage and good practice among the parties.

According to this Lex Mercatoria, judges were chosen according to their commercial background and practical knowledge. Their reputation rested upon their perceived expertise in merchant trade and their fair-mindedness. Their skills and reputation would however still rely upon practical knowledge of merchant practice. These characteristics serve as important measures in the appointment of international commercial arbitrators today.

Merchant law declined as a cosmopolitan and international system of merchant justice toward the end of medieval times. This was to a large extent due to the adoption of national commercial law codes. The result of the replacement of law merchant codes with national governed codes was the loss of autonomy of merchant tribunals to state courts. The main reason for this development was the protection of state interests. However, some institutions continued to function as they used to, the law of the merchants were not eradicated, but simply codified.

The new commercial law is grounded on commercial practice directed at market efficiency and privacy. Dispute resolution has also evolved, and functional methods like international commercial arbitration is now available. The principles of the medieval law merchant, namely, efficiency, party autonomy and choice of arbitrator, are applied, and arbitrators often render judgments based on customs. However, there are opinions, which we do not share, as commented by Tom Carbonneau, in the sense that there are some well known

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<sup>296</sup> Houzhi, Tang, Op.cit. footnote No. 72.

<sup>297</sup> See supra pp. 49.

international arbitrators who disparage the idea of *Lex Mercatoria*, since, according to them, it completely divorced from the true functions of international adjudication. Others envision the question as instrumental to the systemic legitimacy and development of transborder arbitration.<sup>298</sup>

The real fact is that international arbitrators usually do not hesitate to refer to international commercial customs, including contract practices in international trade, as a basis of their award. The particularities of the arbitral process make arbitrators particularly apt to apply commercial custom, since they are familiar with the trade concerned and thus know its usages, and, according to most arbitration laws and private arbitration rules enacted in the last three decades, the arbitrators are required to take into account the relevant trade usages regardless of the law applicable to the substance of the dispute. We also have to remember that arbitrators enjoy broad discretionary power in applying the rules of law.

*Lex Petrolea*, on the other hand, refers also to the jurisprudence that is formed during the time based on the practices, customs, and approaches of the court and arbitration decisions. As Doak Bishop said throughout a published international arbitration awards involving petroleum issues, they are not so numerous yet and do not indicate such a unity of opinion in the international community on the proper resolution of all issues as to create anything like blackletter law rules, nevertheless immense progress has been made in the past 25 years. The publication of awards has allowed later arbitrators to learn from the opinions of earlier tribunals and to build upon the foundation already constructed, rejecting unfounded reasoning and showing a growing sophistication and clarity. The result of this progress is that on some petroleum issues, clear legal rules have evolved, while on others at least the proper range of rules has been identified. This has not yet created a mature set of legal regulations, but it has developed the beginnings of a *Lex Petrolea* that serves to instruct, and in a certain sense even regulate the international petroleum industry. As international arbitration continues to grow, provided that the publication of awards also continues, this *Lex Petrolea* may yet mature into a fully-developed subset of international law.<sup>299</sup>

### **3.4.7 A Socio-Legal Overview of the Award.**

The arbitration proceedings conclude with the decision of the third party involved, it means with the issuance of the award. In Chapter II of this paper, a brief explanation of this document is found as well as the stage of recognition and enforcement of the award.<sup>300</sup> However, our intention now is to make brief comments from a socio-legal perspective.

The purpose of using an alternative method, such as mediation or arbitration, is precisely to resolve the conflict, in other words, to bring the conflict to an end. This goal is not always achieved, because sometimes the decision of the third complicates the situation and simply

<sup>298</sup> Carbonneau, Tom, Op.cit. footnote No. 252, pp. 11.

<sup>299</sup> Bishop, Doak, Op.cit. footnote No. 263, p. 64.

<sup>300</sup> See *supra* pp. 75.

brings the conflict to another level. In this regard, we can speak of the “quality” of outcomes in dispute resolution.

The ideal goal is to find a “win-win” solution, or in other words, to expand the pie, before dividing it. Vilfredo Pareto, an economist and sociologist recalled in Menkel-Meadow work,<sup>301</sup> is responsible for what it is called “pareto-optimality”, which is an outcome measurement which searches for the best possible outcome for parties along an axis of preferences, in which each party is made as well off as possible without further harm to the other party. Some processes may be preferred because of their tendency to produce more pareto-optimal solutions.

The task of the arbitrator is to find out the parties’ real needs. Human beings have very different preferences and interests which more than conflicting they should be complementary. New legal process theorists have made use of a different form of social science than did the first generation of realists, using the human psychology of decision-making, not only by legal elites, but by clients, parties, and other involved in legal disputes.<sup>302</sup>

We recall the practical example was illustrated in Chapter II of this paper, where two kids quarrel for an orange and the mother decides a solution where both ended up with the feeling that won the case.<sup>303</sup>

For an arbitral tribunal to achieve the standard of performance required to make an award which is internationally enforceable, the arbitral tribunal must first declare that it has jurisdiction to resolve the matters it is called upon to determine. In the same spirit it must ensure that it deals with all of these matters. The ideal arbitral tribunal will conduct the arbitral proceedings with careful regard for the provisions of the relevant procedural rules and the governing law. In particular, it will take care to treat the parties equally. It is for example, an express requirement of the Model Law, which is known as the Golden Rule: “the parties shall be treated with equality and each party shall be given a full opportunity to presenting his case”.<sup>304</sup>

### **3.5 Legal Pluralism.**

Summarizing the above ideas, one could say that there are important trends in modern sociology that assign the legal system the integration social function, which is met by two devices: the orientation of the individuals’ behaviour and the resolution of conflicts that arise between individuals or groups. Within this social integration, it was developed the term of Legal Pluralism which has served, as provided by Edgar Ardila, to designate

<sup>301</sup> Menkel-Meadow, Carrie, *Op.cit.* footnote No. 16, pp. 31.

<sup>302</sup> Menkel-Meadow, Carrie, *idem.*, pp. 32.

<sup>303</sup> See *supra* pp. 36.

<sup>304</sup> For further information on the award, see *supra* pp. 71.

parallel forms of social regulation that, in many cases, compete or inhibit the extraction of Law monopoly in the head of the State mechanism.<sup>305</sup>

When we talk of pluralism, it is generally highlighted the importance of inter-ruling, when, for example, a citizen faced, when determining his/her conduct, several rules that foresee contradictory behaviours. In other words, there are several legal rules in force at the same time, regulating differently the same situation, which is contrary to the pyramidal structure of legal norms and the Principle of Exclusivity of the State Law. Within a legal order should not exist conflicting rules.

Related to the concept of pluralism is the concept of multisystem, as the encounter of several existing systems, being a symbolic example the European Union, to the extent that there are two or more coexisting legal systems on the same level. However, the simultaneous multisystem is a phenomenon that really matters to lawyers in the context of a pluralism intended to be reduced. This last multisystem consists of the existence, at the same time and space, and with respect to the same individuals, of divergent legal systems.<sup>306</sup>

Sometimes the opposite trend of legal pluralism happens, when instead of having many or various laws ruling the same behaviour, we face the lack of regulation at all. This situation is known as “legal gaps”, when the cause of a certain behaviour escapes the in-forced legislation. What really interests us is the case of deviation that is where the conduct goes against the provisions of the law, or in other words, when the individual has not responded to the expectations of a given situation. Society does not take care of the diverted individual, since the Law itself provides institutions to restore the legal bond broken by him/her, by responding to the expectations with the consequent damage repair. These institutions are mediation, arbitration or legal court proceedings and according to the time and place, the political, social, economic, and cultural or historical context of each society, one or other of these institutions will be developed to a greater or lesser extent.

For the topic herein researched, it means, Oil & Gas ADR, we could mention various types of legal pluralism, because there are different sets of rules involved, which may belong to different legal systems and sometimes present conflicts among themselves. We conclude the need for harmonization among different legal systems. Considering the subject matter to be regulated, the rules used in the arbitral proceedings can be classified into the following five groups:

1. The legal capacity of the parties;
2. The arbitration agreement;
3. The arbitration proceedings (procedural or adjective law);
4. The merits (substantive law), and;

<sup>305</sup> Ardila Amaya, Edgar, “Pluralismo Jurídico: Apuntes para el Debate. El Otro Derecho”, número 26-27, Abril 2002. ILSA, Bogotá D.C., Colombia, pp. 49 - 50.

<sup>306</sup> Arnaud, André-Jean, Fariñas Dulce, María José, Op.cit. footnote No. 33, pp. 280 - 285.



## 5. The recognition and enforcement of the award.

The adjective Law is used to vent all the procedural stages in the arbitral proceedings, and it is chosen by the parties, either directly, when they write the rules themselves or indirectly, when they choose a set of rules already created previously by an institution. It is also possible the parties adopt a set of rules of an institution and make certain modifications. This marks some of the differences between *ad-hoc* and institutional arbitration. Among the rules governing the arbitration procedure (procedural law) should apply in the first place: (i) That agreed in the arbitration agreement, then, if they do not conflict; (ii) The rules of an institution, if their application is agreed, then, if it do not conflict; (iii) The regulation made by the arbitral tribunal, and then, if they do not conflict, (iv) The rules of the arbitration venue.

The substantive law, by contrast is used to resolve the conflict on the merits. This Law is chosen by the parties in the arbitration agreement itself, and failure to do so, it is up to the arbitral tribunal to make that selection. In some legislation, but not in Mexico, there is a possibility that if the parties choose a substantive Law, which is unconnected with the arbitration in question may be declared void, and in that event belongs to the arbitral tribunal the new election of the Law.<sup>307</sup>

If new election of the law is required, the arbitral tribunal may not decide unreasoned, as it will observe the rules of private international law, taking into account the characteristics and factors connecting the case, such as: (i) the place where the contract was made, (ii) the place of performance of the contract, (iii) the place of location of the subject matter of the dispute, (iv) the address of the parties, (v) the nationality of the parties, (vi) the place of business of the parties, among other points of connection. This difficult task of determining the applicable substantive law has been regulated on an international level by several international agreements among which the European work of the famous Rome Convention is highlighted.<sup>308</sup>

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<sup>307</sup> For example in English law “the proper law doctrine” applied under which the parties are free to choose the substantive law to apply to the settlement of the dispute and, if they do not so, judges or arbitrators shall determine the Law with which the transaction is more closely connected. Even the judges and arbitrators could change the law chosen by the parties in the course of considering that the proper law is that of another country, but of course this power is rarely exercised. See the Contract (Applicable law) Act 1990.

<sup>308</sup> In 1967 there was a proposal by the Benelux countries to the Commission of the European Communities for the unification of private international law. This proposal also covered non-contractual obligations. Finally, in 1980 the Rome Convention was held which entered into force on 1. April 1991. The Convention aims to establish uniformity in the substantive law election rules to contractual obligations in the European Community. In 1988 two protocols of interpretation of the Convention were signed and the Giuliano and Lagarde Report was established which was created by a working group that participated in the drafting of the Convention and serves as an interpretative document. For more information on the Rome Convention, see PM North and JJ Fawcett, “Cheshire and North’s Private International Law”, Twelfth Edition, Butterworths, London, 1992, pp. 457.



Once again, it is mentioned the importance of the Principle of Free Willing Parties which, sharing the view of Jose Luis Siqueiros,<sup>309</sup> allows the parties to freely choose the law applicable to international contracts. However, this choice is not valid when it breaks mandatory law of the forum or when it goes against the institution of public policy (public order). These restrictions on the contractual freedom to choose the applicable law is also found in the choice of forum and are noted in politically sensitive areas, such as loans from the international banking, technology transfer, foreign direct investment and other.

On the other hand, we find the international law on foreign trade that should be considered by the arbitral tribunal when resolving the conflict, because if they decide to apply Mexican Law, they must apply the international conventions and treaties of which Mexico is part of. Such is the case of the United Nations Convention on Contracts for the International Sale of Goods,<sup>310</sup> which is of much use in international commercial arbitration. We also have the Incoterms<sup>311</sup> which are of great interest in this regard.

So, internationally speaking, we can also talk of legal pluralism from different dynamics. The *Lex Mercatoria* takes its place as cosmopolitan law that transcends borders, it does not know and, in many cases, inhibits the law of the state establishing regulatory systems that govern regardless of the attitude taken by the respective states. In this field there are the provisions of the World Trade Organization, the rules of trade investment and transnational corporations, the “internal” control statutes of commercial relations in the core countries, the rules of international sectorial organizations. The international scene has come to the forefront of the debate about legal pluralism because, although the situation of legal pluralism “infra-state” continues broadly, the more pronounced trend is toward expansion of supranational and transnational legal rules.<sup>312</sup>

### **3.6 Sociology of Oil.**

#### **3.6.1 A New Socio-Legal Concept?**

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<sup>309</sup> Siqueiros, José Luis, “El Arbitraje en los Negocios Internacionales de Naturaleza Privada”, Escuela Libre de Derecho, Fondo para la Difusión del Derecho, Miguel Angel Porrúa, Grupo Editorial, Primera Edición, México, 1992, p. 7.

<sup>310</sup> Entered into force on 1 January 1988, being part of such a convention Argentina, China, Egypt, United States, France, Hungary, Italy, Lesotho, Syria, Yugoslavia and Zambia. By January 31 of the same year, Austria, Finland, Sweden and Mexico had become part of the same.

<sup>311</sup> The Incoterms rules or International Commercial terms are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC) widely used in international commercial transactions. A series of three-letter trade terms related to common sales practices, the Incoterms rules are intended primarily to clearly communicate the tasks, costs and risks associated with the transportation and delivery of goods. The Incoterms rules are accepted by governments, legal authorities and practitioners worldwide for the interpretation of most commonly used terms in international trade. They are intended to reduce or remove altogether uncertainties arising from different interpretation of the rules in different countries. First published in 1936, the Incoterms rules have been periodically updated, with the eighth version, Incoterms 2010, having been published on January 1, 2011.

<sup>312</sup> Ardila Amaya, Edgar, Op.cit. footnote No. 305, pp. 49 - 50.

Along with the concepts of conflict resolution and arbitration legal culture and, in order to find the intersection of the present research, we should also consider the concept of “Sociology of Oil”, which is a little explored concept but quite transcendental in Oil and Gas ADR.

According to this concept the discovery of Oil and Gas in certain parts of the world has had large and obvious economic advantages, less obvious, but not less significant, are the social changes brought by these discoveries. The social impact of Oil, which has been marked in environments of the urban areas in different countries, expanded all over the world, in places like Saudi Arabia, Iran, Iraq, Libya, Mexico, Venezuela, United Kingdom, Norway, Russia, Algeria, Nigeria, amongst others. For example, Ron Parsler considers that the social impact of oil in Scotland has led to a process of social acceptance of a new, powerful and alien industry.<sup>313</sup> The problems generated by the development of the oil industry are similar in kind throughout the world but, naturally different in the sense that they are worked out throughout different cultures and social contexts.<sup>314</sup> Growth is not possible without energy and there is nothing on the market that can currently replace Oil & Gas. Without Oil & Gas our financial system is doomed.

Recasens is among the few authors who mention, according to our interpretation because he does not explicitly use this term, the sociology of oil. He mentions that inorganic natural resources are the oldest in the world, but most of them have not been used until very late, simply because they have only been exploited and dominated thanks to the progress of science and technology. Recasens continues making a classification of two types of inorganic natural resources: a) energy sources and b) the structural substances.<sup>315</sup>

The presence of inorganic resources alone does not influence human life. It is precise that humans must get to know their existence and uses they can give them, and also, that they have the technical means to extract, transform, and if necessary, use them. For example, American Indians lived for centuries in areas in which there were oil fields underground, without influencing their life at all.

When some people found some of these natural resources, mainly Oil & Gas, then, they were interested in extracting and using them. The demands of consistent work rate and the economic effect, exert a powerful influence in shaping social structures and in the history of community processes. There are permanent oil communities and other transitory, and their founders have, as characteristic, being adventurers. They usually get these places without their families, so a new chapter of their lives begins.

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<sup>313</sup> This was the focus of an International Conference organized by the SSRC North Sea Oil Panel and held in Aberdeen in March 1978.

<sup>314</sup> Parsler, Ron, “The Social Impact of Oil in Scotland, A Contribution to the Sociology of Oil”, Introduction, Edited by Ron Parsler and Dan Shapiro, England, 1980.

<sup>315</sup> Recasens Siches, Luis, “Tratado General de Sociología”, Tercera Edición, Editorial Porrúa, S.A., México, 1960, pp. 299 -300.

### 3.6.2 Peak Oil and Oil Depletion.

According to Colin Campbell<sup>316</sup>, in recent years there have been two mainstreams on the world oil situation. On one side, there are the “flat-earthers”, and on the other hand, the “Peak Oil theorists”. The first ones typically dismiss arguments that global oil production will peak very soon and subsequently decline in favour of arguments claiming that vast reserves of oil exist somewhere and can be exploited well into the future, thus securing economic growth for decades to come.

Other variation from the flat-earthers include such arguments from the smooth transition to a “hydrogen economy” to the bizarre claims in the absence of any knowledge of the laws of thermodynamics, that modern supply-side economy theory combined with technology will somehow magically produce oil or some cheaper more efficient alternative to the dictates of marked demand.

Peak oil’s empirically based claims can countenance no such sociological or economically rational challenges. It seems today for all purposes that there is little or no spare oil production capacity worldwide.<sup>317</sup>

Without necessarily being in favour of either of the above theories, the reality is that oil and natural gas as renewable energy sources have their days numbered. Campbell said that “the recent disturbances in Britain are like the tremors that precede an earthquake. The earthquake, which is almost now upon us, marks the beginning of the end of the age of Oil. The future is about to arrive.”<sup>318</sup>

The world cannot overlook the reality and we must adapt, in all respects, to the changes that will come. On the one hand, legislative changes are needed, which must adapt to technological changes. Socially, there have been changes and more radical changes can be predicted, since the change of the use of non-renewable to renewable sources is something that has been feeling in recent years, creating an ecological consciousness, a greener one. The change has not been easy because the world is utterly dependent on oil.

We depend on oil for petrol and diesel and therefore for transport, either on land, sea or air. We also depend on oil for the transportation of goods and food. We depend on oil for an uncounted number of plastic products and for many other products such as agricultural fertilizer.

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<sup>316</sup> Dr. Colin Campbell, is a Geologist, leader in the Oil & Gas industry, with more than 45 year career as an exploration geologist, working for BP, Texaco, Amoco and Fina. He has looked for oil all over the world.

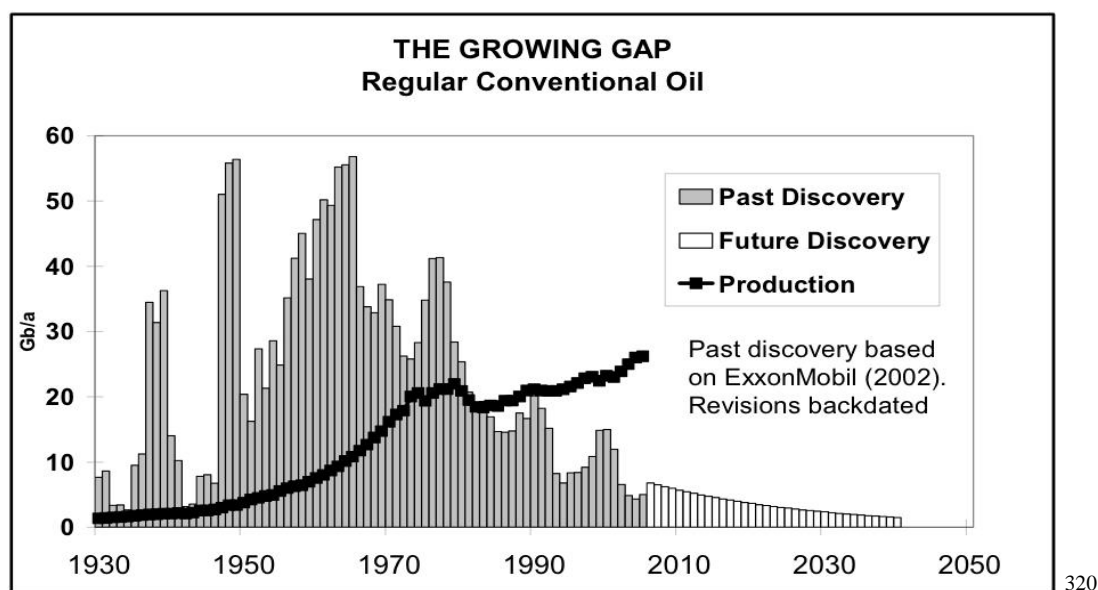
<sup>317</sup> Campbell, J. Colin, “Peak Oil and The Sociology of Knowledge”, Media Release for Immediate Use, 2 February 2005, Wellington. [http://www.oilcrash.com/articles/powr\\_017.htm](http://www.oilcrash.com/articles/powr_017.htm)

<sup>318</sup> Campbell, J. Colin, idem.

The truth is that the Oil & Gas industry has changed and is becoming more expensive to take oil from the ground. In this sense Campbell says that “the big oil fields are discovered first, they are easier to exploit and the oil runs freely and cheaply. When they have gone, the industry turns to the smaller, more difficult fields. There will always be oil in the ground but depletes, it eventually becomes impossible to pump”.

As shown in “The Growing Gap” table below, discovery of oil and gas peaked in the 1960s. Production is set to peak too, with five Middle East countries regaining control of world supply. The oil shocks of the 1970s were short-lived because there were then plenty of new oil and gas finds to bring onstream. This time there are virtually no new prolific basins to yield a crop of giant fields sufficient to have a global impact. The growing Middle East control of the market is likely to lead to a radical and permanent increase in the price of oil.

The world’s economy has been driven by an abundant supply of cheap oil-based energy for the best part of this century. The coming oil crisis will accordingly be an economic and political discontinuity of historic proportions, as the world adjusts to a new energy environment. However, as Campbell believes, it is not necessarily bad news as there are solutions and benefits, provide that action is taken in time.<sup>319</sup>



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Campbell with a prophetic vision has determined the oil depletion by calculating the so called “Hubbert Curve”, according to which, the world sees a production peaking in 2005

<sup>319</sup> Campbell, J. Colin, “The Coming Oil Crisis”, Multi-Science Publishing Co. Ltd., UK.  
<http://www.oilcrisis.com/library/cccrisis.htm>

<sup>320</sup> Discovery trends with past production and extrapolated future discovery.  
<http://peakoildebunked.blogspot.com/2006/02/238-more-fun-with-growing-gap.html>

and thereafter declining.<sup>321</sup> He keeps on declaring that the decline will start first outside the Middle East.

The world will then become increasingly dependent on countries such as Iraq, Iran, Kuwait and Saudi Arabia, but their production will start to decline not long after. Gas supplies will decline not long after oil. Before these situations, different countries have taken precautions and reactions differently, there are Latin American countries that unfortunately are not as cautious as the Europeans and continue with economic policies that seem to have Oil & Gas for the rest of their days.

In this sense Campbell considers that, the Germans, with hardly any oil of their own, take the issue more seriously than in Britain. They have formed a coalition of oil companies, car companies and government to seek long term alternatives.<sup>322</sup>

### 3.6.3 Country Classification.

History, mainly focused on the decisions taken by governments in the oil industry, has shown that the oil industry has been treated differently in the various corners of the world. On the one hand, the way in which this subject matter is legislated, and the way in which economic policies and politic decisions are made.

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<sup>321</sup> As part of the explanation of Oil Depletion, Campbell illustrated the situation with a hypothetical trial, where the judge sets the main terms of reference, in short to determine the status of oil and gas depletion. Several witnesses were called and each was required to explain his particular bias and vested interest, some being administered a truth drug before they took the witness stand. Interesting the result: The executives of oil companies explained how they had a fiduciary duty to sign to the stock market for the benefit of their shareholders, adding that it was simply not their job to explain the nature of depletion. The economists pointed out that the very foundation of their subject were at risk if they were to admit to resource constraints beyond the reach of market forces. The exploration geologist admitted that his job had degenerated to the point of making purses out of sow's ears in the hope of pleasing his employers and providing a livelihood. The investment banker reported that his commissions would suffer if he were to offer anything other than an optimistic view of the future, admitting to no more than short cyclic downturns. The government official saw his role as encouraging exploration whatever the foreseeable outcome. The even-handed Cardinal reminded the Inquiry that Giordano Bruno had been put to death by the Pope on February 17th 1600 for doubting that Earth was flat, and that Darwin had been accused of blasphemy for proposing evolution in terms of the survival of the fittest. Campbell, J. Colin, "Oil Depletion – The Heart of the Matter", The Association for the Study of Peak Oil and Gas, pp. 2, [www.oilcrisis.com/campbell/TheHeartOfTheMatter.pdf](http://www.oilcrisis.com/campbell/TheHeartOfTheMatter.pdf).

<sup>322</sup> As part of that project, BMW has spent vast sums developing vehicles run on hydrogen. They emit only water vapor. BMW chief of science Detlef Frank said: "We can face the future only if we have unlimited access to fuel for mobility and the only alternative we know of is hydrogen". BMW has a vision of a future powered by non-pollutant hydrogen fuel produced from water by electricity created through solar power in a totally clean and renewable cycle of production. Dr. Roger Bentley of Reading University, applauds BMW's efforts but concluded: "there's nothing wrong with the idea of a hydrogen economy. But none of it can happen in the timescale to help solve the oil crisis. Hydrogen needs energy to produce it. Solar panels may be one of those sources, but it is very expensive at the moment. There's a lot more development to be done. And as yet the infrastructure is not in place". Money Programme, Wendsday, 8 november, 2000, "the Last Oil Shock". [http://news.bbc.co.uk/2/hi/events/the\\_money\\_programme/1014236.stm](http://news.bbc.co.uk/2/hi/events/the_money_programme/1014236.stm).

Thus, it is convenient to determine a classification which is commonly described in terms of Reserves and Resources, which are, however, often used in different senses. In plain languages, we need to know the following parameters:<sup>323</sup>

1. Cumulative Production. How much has been produced do-date.
2. Reserves. Estimates of how much remains to be produced from known fields.
3. Yet-to-Find. Estimates of how much will be produced from new fields.
4. Ultimate Recovery. The total endowment, being the sum of these elements.

Campbell has established the following country classification, for modelling purposes, according to which he divided the producing countries of the world into three groups:<sup>324</sup>

1. The Post-Midpoint Countries, which are those that have produced more than half of their assessed endowment (termed Ultimate). It is assumed that their future production will decline at the current Depletion Rate (Annual Production as a percentage of the previous year's Yet-to-Produce, namely Reserves + Yet-to-Find).
2. The Pre-Midpoint Countries, which are those that have not yet reached midpoint and whose production can increase to that point before declining.
3. The Swing Countries, which are Abu Dhabi, Iran, Iraq, Kuwait, the Neutral Zone, and Saudi Arabia, which make up the difference between world demand under various scenarios and what the other countries produce.

It is also convenient to divide the world into the following regions<sup>325</sup>: (i) Middle East Gulf: the swing countries as above; (ii) Eurasia: the former communist bloc and China; (iii) North America: Canada and the USA; (iv) Latin America; (v) Africa; (vi) Europe: Norway, Denmark, UK, Germany, Netherlands, France, Italy; (vii) Far East: from India to Australia; (viii) Middle East (Other): Middle East other than the five Gulf countries; (ix) Other: countries having <500 Mb endowment and/or are not in production; (x) Unforeseen: a balancing item of Reserves and Yet-to-Find to yield a rounded world total Ultimate.

### **3.6.4 The Case of Scotland. (the Origin?).**

As discussed above, the appearance of oil in a society can change its course, so that, people decide to engage in the oil industry, even if they do not have knowledge on the industry. This has happened in several parts of the world, but the example of northern Scotland, has

<sup>323</sup> Campbell, J. Colin, "Forecasting Global Oil Supply 2000-2050". Hubbert Center Newsletter # 2002/3, M. King Hubbert Center for Petroleum Supply Studies, Colorado, USA, July 2002, pp. 1

<sup>324</sup> Campbell, J. Colin, "Oil Depletion" – Updated Through 2001, <http://www.oilcrisis.com/campbell/update2002.htm>, pp. 2

<sup>325</sup> Campbell, J. Colin, Oil Depletion – Updated Through 2001, <http://www.oilcrisis.com/campbell/update2002.htm>, pp. 2



been, to our knowledge, the first case that has been used to analyze and develop the theory of the sociology of oil.<sup>326</sup>

## Scotland



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In the north east a peasantry persisted into the 19<sup>th</sup> century largely due to the availability of virgin land. Thus, peasants cleared the land for a landlord, made it profitable for capitalist farming, and meanwhile their sons and daughters provided labour for the middle and large farms. Fishing flourished and with it the associated industries of cooperage, transport for fish and coal, ice-making, fish processing, boat-building and repairing, the work was seasonal and entailed substantial migration of boats, transport and process workers. This enormous industry experienced a catastrophic collapse with the appearance of the multinational oil companies. However, as commented by Parsel, there is no one industry that one may call “the oil industry” in the north. Most of the activities onshore are undertaken by contractors in the construction industry who will build installations or bury pipes for any client. There are firms engaged in the technically complex construction of large offshore installations. There are firms providing supplies and services to contractor offshore.

Multinationals arrived in this area in pursuit of oil, and property speculators in pursuit of instant profit, rapidly followed by American anthropologists. They only chose to locate themselves in the North Sea because it was profitable to do so. Technical considerations alone make it the last place to choose because the North Sea offers one of the most hostile

<sup>326</sup> For further information on the development of this theory, see Parsel, Ron, Op.cit. footnote No. 314.

<sup>327</sup> Geography, Merriam-Webster’s Atlas, The New York Times on the web, Scotland.



environments in the world and the cost of extracting oil and gas is therefore high. One benefit of the North Sea is that techniques developed there are likely to be effective anyway in the world, and it is therefore a major source of technical innovation and knowledge. The oil companies are there because there are profitably exploitable reserves of oil and gas. The profitability of oil and gas depends upon many factors including the size of the reserves, the geographical difficulties of extraction, the capital costs of doing so and transporting the products to the shore, but it also depends upon the world demand for and price of oil and the taxation regime under which the oil is extracted. This is what the sociology of oil should consider when analyzing a case. Also the role of the State and especially of the state vis-à-vis the oil companies is immediately relevant for a socio-legal analysis.

Major companies, employing large labour forces have moved into the north, they have both brought labour with them and recruited locally. Perhaps one of the most important social changes was that all these activities create jobs for different local groups, from the pool of unemployed to farm workers leaving the land. They also provide employment for women and thus offer completely different opportunities for women in towns where they hardly had an appearance on the working map.

The north and north east of Scotland have quite distinct characteristics which were recognized in cultural terms. The Scandinavian and Gaelic Highlands and Islands and Buchan are areas with distinct histories and different land tenures and languages. These are significant differences that have to be taken into account when investigating the social and cultural effects of the impact of oil.

The issue of the socio-legal analysis of the Oil & Gas industry of the north of Scotland may be subject to an independent research work, for now it is only relevant to mention that may be considered as the origin of the theory of the sociology of oil. Although, there are a lot of unfinished and abandoned papers on the sociology of North Sea oil development. We can mention though, the work of Johan Galtung,<sup>328</sup> who analyzed the roles of the transnational corporations and then concentrated upon those countries where these corporations have a dominant role. Some third-world countries are in a strong bargaining position and other align themselves entirely with these corporations rather than being subordinate to them or dominating them. According to Galtung, sociology is relatively underdeveloped in its analysis of the peripheries of metropolitan powers and conditions in which these corporations and states are bargaining roles.<sup>329</sup>

### **3.6.5 The Case of Venezuela. (a Left Wing Case?).**

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<sup>328</sup> Galtung was born on 24 October, 1930. He was a Norwegian sociologist and the principal founder of the discipline of peace and conflict studies. He founded the Peace Research Institute Oslo in 1959, serving as its Director until 1970 and established the Journal of Peace Research in 1964. In 1969, he was appointed by the King-in-Council to the world's first chair in peace and conflict studies, at the University of Oslo. He resigned his professorship in 1977, and has since held professorships at numerous universities around the world. He was awarded the Alternative Nobel Prize in 1987.

<sup>329</sup> Parsel, Ron, Op.cit. footnote No. 314, pp. 22.

Venezuela is another interesting case, and no doubt could be considered the subject of an independent research on how the Oil & Gas industry has influenced the development of a community. What interests us is simply to note the fact that this phenomenon can take two opposite directions, on one hand the case of Saudi Arabia where, as we shall see, the discovery of oil has led to a community with a high standard of living and on the other hand, the case of Venezuela where, although the numbers show that there has been a growth in the economy, it is also questioned the positive result in the social field.

## Venezuela



Venezuela before a mining country, it was an oil country. Before the arrival of the Spanish, the natives knew about oil which named it: “mene”. They used it to waterproof their canoes and lighting. In 1799 Alejandro Humboldt found a source of oil in the Araya Peninsula. By 1839 the government entrusted to José María Vargas to investigate about the product. Having made the respective findings, he suggested that this matter was richer than gold for the great opportunity to use it.

In Venezuela, oil begins to operate from 1875, after an earthquake that released oil in large quantities. Mr. Manuel Pulido founded the first Venezuelan oil company. The company was called “Petrolera del Tachira”. Later the first refinery was built.

In 1946, after the first legal ordering on the conservation and use of gas, the rational use as fuel and raw materials began. By 1960, the company Venezuelan Petroleum Corporation was founded. Three decades later, in 1975, it was established the company Petróleos de Venezuela SA (PDVSA), a company owned by the Bolivarian Republic of Venezuela.

<sup>330</sup> Geography, Merriam-Webster’s Atlas, The New York Times on the web, Venezuela.

PDVSA is one of the most important oil companies in the world, which is mainly engaged in the exploration, exploitation, marketing and distribution of petroleum and its derivatives. PDVSA's international activities have had an unprecedented expansion in recent years, contributing to the projection of the Company in the world. It currently maintains a strong presence abroad through five offices located in Argentina, Brazil, Cuba, United Kingdom and the Netherlands, which maintains an extensive business relationship with its partners in the region and those nations that possess an extensive potential for investment in the oil business.

The other side of the coin, from our point of view and being the reason why we consider this case as a left wing case, is that the current government has handled the oil industry for the benefit of individual groups and do not want to use the advantages that could have while having an oil industry as few in the world. So, we can say that the middle class has disappeared in this country, who are often forced to leave the country. Poverty continues in this Latin American country and the dictatorship of President Hugo Chavez avoids social development that a country with these characteristics should have.

### 3.6.6 The Case of Saudi Arabia. (a Right Wing Case?).

We consider the case of Saudi Arabia as a right wing case. Our opinion is that this country has taken advantage of its Oil & Gas industry, not only from the economic point of view but also from the social one, getting a better way of living to its inhabitants. This topic can also be an object of an independent research, which is why we just limited ourselves to mention few statements that support our opinion.

#### Saudi Arabia



<sup>331</sup> Geography, Merriam-Webster's Atlas, The New York Times on the web, Saudi Arabia.

Saudi Arabia has an oil-based economy with strong government control over major economies activities. Saudi Arabia possesses 18% of the world's proven petroleum reserves ranks as the largest exporter of petroleum, and plays a leading role in OPEC, although its influence has waned in recent years.

Saudi Arabia culture is very rich and diversified with people from all over the world living and working there. The culture is largely influenced by Islamic values, Islamic heritage and Bedouin traditions. This might be one of the reasons the country has known to take advantage of the natural sources and to increase the services for their citizens.

Saudi Arabia has also a very important oil company, its name is Saudi Aramco. It is the world's largest and most valuable privately-held company, with estimates of its value in 2010 ranging from 2.2 trillion USD to 7 trillion USD. Saudi Aramco has both the largest proven crude oil reserves, at more than 260 billion barrels and largest daily oil production. The company has headquarters in Dhahran, Saudi Arabia, and operates the world's largest single hydrocarbon network, the Master Gas System. Its yearly production is 7.9 billion barrels and it managed over 100 oil and gas fields in Saudi Arabia, including 279 trillion scf of natural gas reserves. Saudi Aramco owns the Ghawar Field, the world's largest oil field, and the Shaybah Field, one of the world's largest of its kind.

We cannot talk of this country without mentioning Aramco, which is the national Oil & Gas company and top one in the world. The Arabian-American Oil Company (ARAMCO) was originally formed by several multinationals to hold the concessions that were received from the King of Saudi Arabia. After many round of renegotiations, the Saudi Government holds a majority ownership in Aramco. The government has continued to allow this jointly owned entity to control the development of mineral reserves within the Kingdom. The company's operations span the globe and range from exploration and producing to refining, chemicals, distribution and marketing.<sup>332</sup>

Finally, we just mention the opinion of Redfern and Hunter in respect to some economies in this part of the world. They consider that in many mixed economies particularly in the countries of the Arabian Gulf and elsewhere, the state has emerged, either on its own account or through a state corporation or other entity, as owner and operator of airlines, merchant fleets, oilfields, oil companies, refineries, process plants, as well as banking, investment and trading corporations.<sup>333</sup>

### **3.6.7 The Case of Mexico. (Is it a Neutrally Balanced Case?).**

Among the sources of social change, namely those that enable a society to be dynamic, we can mention the external factors of nature, the increase or decrease of population, religious influences, scientific discoveries and technical inventions, but preponderantly economic

<sup>332</sup> For further information on the company see. <http://www.saudiaramco.com>.

<sup>333</sup> Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 45.

factors are determinants of social change. Then, for example, the existence and use of organic and inorganic natural resources, the processes of industrialization or the increased demand or consumption of certain goods, are socio-economic facts which engender new social changes, not only in the strictly economic sphere but also in other social realities.

## Mexico



The oil resource is classified as non-renewable natural resources and it has a significant importance and sometimes decisive in the life of the people since many of the political and social developments in the last century, would be incomprehensible if they did not have their origin in the oil wealth.<sup>335</sup>

The case of Mexico and its oil does not escape this phenomenon precisely because it is a country blessed by nature with sufficient resources, which constitutes the first element of economic importance, necessary to achieve the organic growth of any nation. However, to achieve economic development it is also required, besides, the conjunction of a second element consisting of the proper way to take advantage of such resources. In other words, is not sufficient the mere existence of resources, but human intervention is required to exploit them properly, that is a good policy to regulate their use. Wealth does not consist merely in the existence of resources like oil, but is based mainly on human behaviour to

<sup>334</sup> Geography, Merriam-Webster's Atlas, The New York Times on the web, Mexico.

<sup>335</sup> It is a known case, the case of the mines in the state of Hidalgo, Mexico, which at the end of the nineteenth century, to the operation of machinery, required as abundant amounts of firewood that would destroy the forests of the Sierra de Pachuca, and it was the oil exploitation the fact that benefited the conservation of forests, since its use as fuel in manufacturing plants and railroads and its use in the domestic sector, came to represent a relief in the consumption of firewood and coal.

find, transform, consume or use them. The reality of the wealth derives from the talent, imagination, creativity and experience of the humans whose efforts to act make possible their use and economic development of nations.

In Mexico, regarding the social impact of activities related to the oil industry and the exploration and exploitation of these resources, two periods can be distinguished: before 1938 and after 1938, year of the oil expropriation to which extensive reference is made in another area of this work.

During the first period, it means, before the oil expropriation, exploitation of oil begins in parallel with the early nineteenth century, achieving spectacular returns for 1910 in the area called “Golden Strip” and Poza Rica fields in the State of Veracruz, that by the year of 1921 placed Mexico as the second producer reaching a production of over 193 million barrels. However, by 1932 production was reduced to less than 33 million barrels and on the eve of the expropriation, after a slight improvement, reached only 46.8 million barrels.

There are several aspects that characterized the development of the oil industry during this first period:

- a) The manufacture of automobiles on a large scale in the United States that was a major impetus for the development of the oil industry.
- b) The discovery of the burner allowed the use of heavy oils and refinery residues in the boilers of ships.
- c) Derived from an increase use of automobiles, a demand for asphalt pavements was increased.
- d) By 1901 there was not specific legislation on oil and until 1884 it survived the principle of national ownership of the subsoil and its exploitation by individuals under a state concession system. However, both the National Mining Code (Código de Minería Nacional) of 1884, and the Mexican Oil & Gas Law (Ley Petrolera Mexicana) of 1901, the right of private property owners to exploit oil without concessions was recognized. This was contrary to the old principle of native property of the nation over all products in the subsurface. This situation was reversed only in the Constitution of 1917, but was fully effective until 1938.
- e) The continuous rise of oil production was for the exclusive benefit of foreign companies, since the Mexican governments during the revolution did not pay attention to the issues of oil, so the advantage was for the mentioned corporations.
- f) There was wasted oil, premature exhaustion of oilfields, failure to implement appropriate technical rules, constant fire, wasted capital that only left salaries and taxes in



the country, few indeed, indiscriminate laying of pipelines, invasions of property, oil robberies, and breach of contract, among other relevant facts.

g) The influence of the oil industry on Mexico's economy was quite limited, especially from the standpoint of its contribution to national progress, because: (i) the country was primarily rural, with little industry and few means of transport, (ii) the revolutionary era did not allow the performance of productive tasks, but debts and lack of savings, (iii) foreign companies did not favour the development of the country, so their primary goal was the export of oil, in addition to the fact that few refineries were built with only basic techniques and (iv) reduction in the production of hydrocarbons from 1925 to 1932 led to a devaluation in 1932 and in 1938 the expropriation led to another devaluation, combined to the capital flight.

In summary, at this first stage, the oil industry was a separate sector of the general economy of the country and focused on export, exerting a rather broad negative influence. It can be said, without a doubt, that in Mexico there was economic growth due to increased economic activities, particularly those related to hydrocarbon production, but there was no economic development, understood as the representation of higher living standards for the population as a whole.

The second period, it means from 1938, year of the oil expropriation, has different characteristics and more encouraging for the overall economy of Mexico.

The main features of this stage can be summarized as follows:

a) The Mexican government created a new institution, *Petróleos Mexicanos*, to perform all operations related to the oil industry as exploration, extraction, refining and storage as well as distribution and alienation of oil and its derivatives which belong to the nation.

b) Oil production has improved every year so that by 1960 was around 105 million barrels, registering an average annual growth of 13%. As for recent years, with figures of barrels per day, next it is shown the following data.

Country	2001	2004	2005	2007	2009
México	3'590,000	3'460,000	3'420,000	3'501,000	3'001,000

c) During the 54-year period from 1941 to 1994, the most dynamic branch of industry was electricity, which grew at an average annual rate of 8.9%, no doubt influenced by a high consumption of fuel for its power plants; followed by oil and gas, which in the same period grew 7.5% in annual average. The petroleum industry showed variable rates of growth, because although its rate of production decreased in 1943, 1983, 1985, 1986 and



1989, its biggest growth was in the administration of President Lopez Portillo (1976 to 1982), which grew an average annual rate of 18.2%.<sup>336</sup>

d) The growth of the nationalized oil industry has been the mainstay of the country's industrialization. Only from 1938 to 1959, exploration groups increased from 4 to 41, known oil reserves increased from 835 to 4,348,000,000 barrels, refining capacity rose from 102,000 to 350,000 barrels per day, length of pipelines increased from 1500 to 6700 kilometres, the storage capacity in plants and sale terminal increased from 218 to 500 million litres and the capacity of the tanker fleet increased from 36,500 to 230,000 tons.<sup>337</sup>

e) PEMEX has developed a highly integrated public company to satisfy domestic consumption and, later on, for export. From the seventies, important deposits such as Cantarell in Sound Campeche, or the asset-Maalob Ku-Zaap were discovered.

f) As of 31 December 2010, the total 3P hydrocarbon reserves (proved, probable and possible reserves) amounted to 43,073.6 million barrels of equivalent oil. Of these reserves 13,796 million barrels were proven, 15,013.1 million barrels probable, and 14,264.5 million barrels possible.<sup>338</sup>

g) PEMEX has also had an important development by creating its own technology for exploration, production and industrial processes, which has allowed it to build refineries, petrochemical plants and laying pipelines, among other important actions.

h) The evolution that has occurred in this period has impacted other productive sectors such as derived petrochemicals, fertilizers, metallurgical industry, agriculture, construction, engineering, transportation and more. On the other hand, we stand out as very relevant that the development of the oil industry in Mexico has brought much public and private investment and contributed to job creation, regional development and economic growth in the country. An example of this, derived from the change in legislation in 1995, is the private sector participation in transport, storage and distribution of natural gas, which has resulted in a momentous expansion of distribution systems with industrial, commercial, and residential impact in much of the country.

i) Since the discovery of Cantarell, and considering the tax crisis that affected the income of the Mexican state, due to the oil production and the volume of exports went to the collection of tax revenue for the federal government, causing that PEMEX to date, as a company, do not have the necessary resources for their development. Therefore, it is understandable the increasing imports of oil and petrochemical for this industry. From another angle, the macroeconomic stability of Mexico is explained by the extraordinary income from oil exports and high prices, which have brought an additional flow of billions of dollars to the country.

<sup>336</sup> Méndez, M., Silvestre, J., "Problemas Económicos de México", Tercera Edición. McGraw-Hill, pág 135.

<sup>337</sup> "México 50 Años de Revolución", Fondo de Cultura Económica, Tomo I: La Economía, Págs. 328 y 329.

<sup>338</sup> See, Secretaría de Energía: [www.sener.gob.mx/res/0/SENER\\_5.pdf](http://www.sener.gob.mx/res/0/SENER_5.pdf)

j) Based on the Cantarell decline from the year 2004, the energy reform in November 2008 in Mexico seeks to diversify its strategy of exploration and production which identifies four areas of operation in which they should work: (i) exploration and development of prospective resources in the basins of the southeast, (ii) exploitation of abandoned fields, (iii) development of the Paleocanal of Chicontepec, and (iv) exploration and development of the deepwater of the Gulf of Mexico.

k) In addition to the challenge in the exploration and production, it should also face other challenges of major proportions to expand the processing capacity and to facilitate the industrial expansion of infrastructure in transport, storage and distribution of petroleum and basic petrochemicals. With regard to refining, it will be necessary, in order to produce the total of the gasoline which will be required in twenty years in the country and eliminate imports, in addition to the reconfiguration of existing refineries, to put into operation a new refinery every three four years.

In summary, this second stage, the oil industry has been a trigger for development, exerting a positive influence for national progress and representing better standards of life for the population as a whole.

Parts of Mexico have received direct benefits from the growth of this industry, such as regions of the states of Campeche, Tabasco, Veracruz and Tamaulipas, which at various times have been impacted favourably with an important regional development.

In Tabasco, to name just one example, the growth in infrastructure such as (i) highways Villahermosa - Ciudad del Carmen, Villahermosa - Chetumal, Coatzacoalcos-Villahermosa Villahermosa – Cardenas; (ii) Public works in communications, such as bridges, “Frontera”, “Balancán”, “Jonuta”, “San Pedro”, “Provincia”, “José Colomo” and “Pitahaya”; (iii) city beautification as the state capital with avenues, paths, fountains and boardwalk, urbanization of the municipalities; (iv) the modern international airport of Villahermosa; (v) the Regional Museum of Anthropology “Carlos Pellicer Cámara”; (vi) the State Theatre “Esperanza Iris”; (vii) underpasses, widening of streets; (viii) construction of urban development “Tabasco 2000” (a mega city project which houses residential areas of middle and upper classes, shopping malls, hotels and public offices); (ix) the building of schools and libraries in rural areas; (x) the promotion of culture and human development, (xi) the construction of the Library “José María Pino Suárez”; (xii) and the arrival of thousands of people and hundreds of companies linked to oil industry are linked to the so-called “oil boom”<sup>339</sup> in the state. With the above, it is shown, objectively, that the existence

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<sup>339</sup> Derived, among other works, of the discovery and exploitation of large deposits in the municipality of Macuspana, where the oil fields “Fortuna Nacional”, “Vernet”, “Morelos” and “Colomo” were developed, and the construction of petrochemical complexes such as “la Venta and Ciudad PEMEX”, as well as the discovery of significant deposits in the municipality of Centro, Cunduacán, Nacajuca, Cárdenas, Huimanguillo and Comalcalco, and of the construction of the oil port of Dos Bocas and the petrochemical complex “Nuevo PEMEX”.

and use of oil in Mexico, and their rational use in the second period, after the oil expropriation, links the processes of industrialization or increased demand or consumption hydrocarbon with a number of social changes that are recorded not only in the strictly economic sphere but also in other social realities, in other words, the application of Sociology of Oil in Mexico.

### **3.6.7.1 A Brief History of the Mexican Petroleum Industry.**

As Francisco Rojas G.<sup>340</sup> mentions, the oil activity has been very closely attached to the social and political movements of the country throughout different times, and it has had indeed a vital relevance in its economic evolution. It is precise to say that the expropriation of the industry, happened shortly after the nationalization of the railroads. It was the action more significant and eloquent of a country decided to defend its natural resources and its free destiny, before the strong penetration of the outside interests. Sharing this idea of Francisco Rojas, it is important to know the historical part of the Mexican oil industry, in order to be able to understand the origin of the present conflicts that the most important company in Latin America can have with entrepreneurs and governments either foreigners or locals.

#### **3.6.7.1.1 The Beginning of the Oil & Gas Industry in Mexico.**

In agreement with archaeological registries, the Oil & Gas industry in Mexico started since the cultures of the prehispanic Mexico coming from the zone of the Gulf of Mexico, which has been a region with abundant superficial black bitumen deposits known as “chapopoteras”.<sup>341</sup> This black bitumen, called then as “chapopotli”<sup>342</sup> was used approximately 2000 years ago in the daily life of the Mesoamericans inhabitants, in the elaboration of clay pieces and as medicinal ointment, toothpaste, adhesive, waterproof or ceremonial element.<sup>343</sup>

This material was collected directly from the superficial deposits of the runoff or by decanting the waters of some lakes or rivers. There is evidence of its use in certain rituals.<sup>344</sup>

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<sup>340</sup> Rojas G, Francisco, Presentation of the book: Casasola V. Miguel, Silva Herzog, Jesús, “La Expropiación del Petróleo 1936-1938”, 50 Aniversario PEMEX, Fondo de Cultura Económica, Primera Edición, México, D.F., 1981.

<sup>341</sup> In agreement with the opinion of Francisco Mariel Lezama, the Chapopoteras are natural petroleum outcrops, Lezama, Francisco Mariel, “Historia de la Exploración Petrolera en México”, Article published at: <http://www.ref.PEMEX.com/octanaje/23explo.htm>.

<sup>342</sup> Etymologically, the Nahuatl word “chapopotli” is formed by the combination of two words: tzouctli, glue, rubber, and popochtli, perfume or odor. Cecilio A. Robelo, “Diccionario de Aztequismos”, México, Imprenta del Museo de Arqueología, Historia y Etnología, 1912, p.536.

<sup>343</sup> Celis Salgado, Lourdes, “La industria Petrolera en México. Una Crónica I: de los Inicios a la Expropiación, Petróleos Mexicanos, México, 1988, pp. 29-32; Meyer, Lorenzo y Morales, Isidro, “Petróleo y Nación (1900-1987): la Política Petrolera en México”, Fondo de Cultura Económico, Secretaría de Energía, Minas e Industrias Paraestatal; México, 1990, p. 17.

<sup>344</sup> Celis Salgado, Lourdes, idem., pp. 29

Later on, in the colonial period, the Spaniards did not give it a more practical use than the one given by the natives. In fact the petroleum found in the land surface was considered as an injurious element for agriculture and cattle ranch. The Spanish crown had interest in the mining<sup>345</sup> of the new continent more than in the oil industry. However, the oil industry was including within the mining regulation of the time with the intention to obtain major tax collection.<sup>346</sup>

### ancient “chapopotera”



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Time later, when the period of independence had finished and the republic was consolidated, the Nation occupied the place of the monarch. Nevertheless, the Spanish notion of the subsoil property, which included petroleum of course, continued dominating until century XIX. In this century, several attempts in Mexico were made to make the petroleum industry an income-producing industry.

The imperial government of Maximilian tried to promote oil activities through the granting of 39 concessions for exploitation.<sup>348</sup> During this government, preservative groups

<sup>345</sup> Silver and gold were the metals mainly looked for the Spanish Crown.

<sup>346</sup> The Real Decrees for the Mining of the New Spain, issued in 1783, determined that all the wealth that could be extracted from the subsoil, including the petroleum or “juice of the Earth” according to the terminology of the time, was patrimony of the Real Crown and therefore, only the Crown had the power to grant them in property and possession to individuals for their operation. Alvarez de la Borda, Joel, “Los Orígenes de la Industria Petrolera en México”, PEMEX, Archivo Histórico de Petróleos Mexicanos, pp. 18.

<sup>347</sup> This is a picture of an ancient “chapopotera”, taken from: <http://temaslemasydilemas.blogspot.com/2011/10/historia-de-un-saqueo-pemex.html>.

<sup>348</sup> The concessions included diverse zones located in Tabasco, State of Mexico, Isthmus of Tehuantepec and Puebla. None could be exploited. Lavin, José Domingo, “Petróleo: Pasado, Presente y Futuro de una Industria Mexicana, FCE, México, 1979, p. 40.

promoted a series of measures of liberal cuts that regulated the uses of the subsoil. In 1865, the imperial government promulgated “the working of the substances that are not precious metals” and issued a series of measures, according to which, the concessionaires had to be identified since it was “already a necessity to establish a roster of them due to the development the industry.”<sup>349</sup>

The Porfiriato that covered from 1876 to 1911 was, without doubt, as described by Jonathan Brown, an economic expansion time without precedents. Compared with the economic decay and the political instability that reigned in Mexico from the beginning of the rebellion of the Independence of 1810, the administration of Diaz seemed to provide peace and prosperity. The foreigners found Mexico so attractive that injected the country an estimated amount of 3.4 billions of pesos around 1911. The French and Dutch capital financed the national debt. Germans invested in manufactures, North Americans in mining and later in petroleum, British and Canadian in public service companies and North Americans and British in railroads.<sup>350</sup>

In the specific case of the Oil & Gas Industry, several attempts to start this industry followed, as it was the case of the former Governor of Tabasco, Simón Sarlat Nova, who between 1873 and 1884, bought a petroleum “mine” that had belonged to Manuel Gil with the intention to reinitiate its operation. However, in spite of having founded a company with such a purpose, the business did not prosper because it did not count on means of transportation for the crude, as well as the limited national and international market.<sup>351</sup>

Another attempt was the one of the Americans Adolph Preston John Autrey and John F. Dowling who erected a company named Compañía Explotadora de Petróleo del Golfo de México to produce kerosene and to sell it in neighbouring zones in the state of Veracruz.<sup>352</sup> The cause of the non-success of the project was also the transportation system since it was so rudimentary that it was carried out with back of mules. On the other hand, the Hacienda Cerro Viejo, which first operator was a sailor of Boston in 1876 and later on Cecil Rhodes in 1884, without achieving any success in spite of heading the partnership London Oil Trust and its great experience in diamond mines in South Africa.<sup>353</sup>

In order to stimulate the development of the industry, the Mexican mining laws changed in 1884, modifying the colonial disposition that the Nation was owner of the subsoil to benefit the superficial proprietors. Thus, North-Americans and British came to the country to try to develop the Oil & Gas industry, setting up companies such as: the Mexican Oil Corporation, the Mexican Asphalt Pitch and Oil Wells, the Mexican Properties and the Oil Fields of Mexico Company. This last one was organized by Percy N. Furber, who, with his

<sup>349</sup> Celis Salgado, Lourdes, Op.cit. footnote No. 343, pp. 38.

<sup>350</sup> Brown, Jonathan C., “Petróleo y Revolución en México”, Siglo Veintiuno Editores, Primera Edición en Español, México, 1998, pp. 19.

<sup>351</sup> Lavin, José Domingo, Op.cit. footnote No. 348, p. 15-19.

<sup>352</sup> In 1869 Mr. Autrey acquired “La Constancia” an oil property with a small well-known distillery named El Caguas, near Papantla, Veracruz. Alvarez de la Borda, Joel, Op.cit. footnote No. 346, pp. 20.

<sup>353</sup> Meyer, Lorenzo y Morales, Isidro, Op.cit. footnote No. 343, p. 18-19.

partner Luis de la Barra, brother of Francisco Leon, influential lawyer who occupied the interim presidency of Mexico when Porfirio Diaz came out in 1911, managed to secure the support of the dictator for their projects.<sup>354</sup>

The first Petroleum Law promulgated in 1901, shows the meaning that began to acquire the operation of the crude in the Mexican deposits. In such legislation it was settled down that the permits could be granted to individuals or companies properly organized and would only last an unextendable year. During this time, nobody different from the person or company which had been granted the respective permits, would have the right to make explorations within the corresponding zone. This law established that the discoverers of deposits or petroleum sources or gaseous hydrogen carbides which, at least rendered two thousand liters every 24 hours, would enjoy exclusivity in the exploration or exploitation in the surrounding area of the well.<sup>355</sup>

Even though the 1901 law established control bases on the Mexican oil industry, these could not get to encourage the little national investment and the promising foreign investment.<sup>356</sup>

Furber, who learned on the subject of petroleum, created a new American company with which he managed to perforate wells in Mexican territory; nevertheless, the problem he faced was the equipment transportation to Mexican territory and the crude transportation. Finally Furber sold the company Oil Fields of Mexico to the Mexican Petroleum company “El Aguila” in 1914.

Important role had the American company Waters-Pierce Oil Company that, between the decades of 1880 and 1900, had the sale monopoly of the oil with illumination purposes and lubricants as well as other crude derivatives in all the Mexican Republic.<sup>357</sup> The company was organized by Henry Clay Pierce, dynamic businessman of New York and Williams H. Waters. This company had installed platform refineries in Tampico and Veracruz where they refined 450 and 250 daily barrels respectively, getting to be the most successful company in the sector, until the problems with competitors arose mainly focused on monopolistic questions in the market.<sup>358</sup>

The majority of the authors who deal with the subject agree on the fact that the Mexican Oil & Gas industry begins, with favourable results, at the beginning of the 1900, when the existing wells throw the first commercial petroleum production. The fuel and oils derived from petroleum were used by innumerable industries in the country, having emphasized the rail industry. In a parallel way, several legislative changes became into forced.

<sup>354</sup> Alvarez de la Borda, Joel, *Op.cit.* footnote No. 346, pp. 22.

<sup>355</sup> Celis Salgado, Lourdes, *Op.cit.* footnote No. 343, pp. 42

<sup>356</sup> Celis Salgado, Lourdes, *idem.*, pp. 45

<sup>357</sup> Jonathan Brown considers that the reason of this monopoly was the strategic position that this company had in the oil industry in the United States. It did not operate nor it refined oil products within the United States, it only sold them. Brown, Jonathan C., *Op.cit.* footnote No. 350, pp. 21.

<sup>358</sup> Brown, Jonathan C., *idem.*, pp. 35-37.



Edward L. Doheny, a North-American oil businessman and his partner Charles A. Canfield later explored several zones of filtrations in the surroundings of Tampico, returning after just a short time to the United States to look for financing and to develop the project of land purchase, exploration and exploitation of the crude oil.<sup>359</sup> Doheny expressed years later: “we knew that we were in an oil region which would produce limitless amounts of what the world has been in great necessity: petroleum”.

In 1901 a Mexican engineer, Ezequiel Ordoñez, discovered an oil deposit called “El Pez” (the Fish), located in the Field of the Ebony in San Luis Potosí. In that same year President Porfirio Díaz issues the Law of the Petroleum with which he manages to impel the oil activity, granting ample facilities to foreign investors.<sup>360</sup>

The first company that Doheny set up in the city of Los Angeles was the Mexican Petroleum of California. In 1906, American explorers extended their search scope and arrived at the Huasteca Veracruzana,<sup>361</sup> being towards 1911 that this company controlled lands of a total of 212, 467 hectares.<sup>362</sup>

#### Doheny's drilling crew at El Ebano, 1902



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Another businessman who is worth to mention was Weetman D. Pearson, who with his company S. Pearson & Son Limited, entered into diverse industries in this Latin American country, mainly in the regions of the Isthmus and Tabasco, taking advantage of the good

<sup>359</sup> Pablo Martínez del Rio was the legal adviser who helped Doheny to develop his projects.

<sup>360</sup> “the History of Petróleos Mexicanos”, at <http://www.PEMEX.com>.

<sup>361</sup> Some of the lands they bought were: La Pitaya, Monte Alto, Los Higueros, San Gerónimo, Chinamapa, Cerro Azul, Juan Felipe, Cerro Viejo or Cuchillo del Pulque.

<sup>362</sup> Alvarez de la Borda, Joel, Op.cit. footnote No. 346, pp. 38.

<sup>363</sup> This is a picture of Doheny's drilling crew at El Ebano, 1902, taken from: <http://publishing.cdlib.org/ucpressebooks/view?docId=ft3q2nb28s;chunk.id=d0e2357;doc.view=print>.



relation he had with Porfirio Diaz and the elite of the time. Pearson was advised by the oil engineer Anthony F. Lucas, who discovered and perforated the first oil wells in Texas.

At the beginning of the century, the oil businessmen who invested more than what they had first thought, had great problems due to geographic and technological factors as well as the competition of the crude obtained in Texas. In order to face these problems and to give away their production, they developed a plan to sell heavy crude oil to the cities with the purpose to asphalt the streets.

In 1904, the Mexican petroleum found a deposit to almost 500 meters of depth. The called well El Pez (the Fish) number 1, threw 1.500 daily barrels of crude, being the first important production in Mexico.<sup>364</sup> Thus, the North American company began a project of territorial expansion to look for more wells and to develop diverse projects of restraint tanks and pipe lines to transport petroleum.<sup>365</sup> At this new stage, the business of Doheny became a group forming new companies such as the Huasteca Petroleum Company, the Tuxpan Petroleum Company and the Tamiahua Petroleum Company, being the holding company the Mexican Petroleum Company Limited of Delaware.

Pearson also saw growth in his business establishing a refinery in Minatitlán and a pipe line that connected with the fields of San Cristobal, which was until that moment, the unique productive wells. Pearson found market in the United Kingdom to place his petroleum and somehow began an international stage in the Mexican oil market.

Furber, without having the production of his competitors, continued producing in a region denominated “Furbero” located at 120 kilometres of Tuxpan. Just a short time later, he sold crude to Pearson so that he could afford his international commitments.

Thus, the Oil & Gas industry in Mexico grew little by little although it was still an extremely expensive business due to the required expertise of the people who took part of it, as they were lawyers, technicians, etc. The oil businessmen looked for wells in diverse zones finding some ones productive and others not that much. In the properties of Dos Bocas, a well suddenly sprouted, giving 100,000 daily barrels of crude, but the associate gas caused a fire that practically devoured the crude; nevertheless, it served to animate the finders of black gold to follow ahead.

These three great men were in charge of the beginning of the oil industry, in 1908, also known as “the Mexican oil war”.<sup>366</sup> 1910 was a good year for the industry, since great

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<sup>364</sup> The well threw a petroleum spurt of 15 meters of height and counted on a depth of 1650 feet. Celis Salgado, Lourdes, Op.cit. footnote No. 343, pp. 45

<sup>365</sup> It was initiated the installation of 16 steel tanks and a pipe line of 12 kilometres equipped with ten pumping stations that would transport the crude oil of the zone of operation to a terminal station close to Tampico. Alvarez de la Borda, Joel, Op.cit. footnote No. 346, pp. 46.

<sup>366</sup> Between 1906 and 1910 the government granted a great number of oil concessions that protected immense areas, especially lagoons and marsh of the Eastern coastal region of the country. Celis Salgado, Lourdes, Op.cit. footnote No. 343, pp. 59.

discoveries appeared, like the following wells: Casiano Núm. 6 and Casiano Núm. 7, property of the Huasteca Petroleum Company, this last one with a spectacular flow of 60,000 daily barrels. This well was named “the Wonderful Well”. Between 1910 and 1911, El Aguila arose its production from 210,000 to 3,8 million barrels having to quickly act in the installation of pipe lines and deposits. Thus Doheny and Pearson began to compete for a good position in the markets of the United States, Europe and Latin America. The national production raised from 3,6 annual barrels in 1910 to 12,5 million in 1911.

The discoveries of great petroleum deposits in Mexico matched with an expansion of the international demand of fuel due to the appearance of the automobile, railroad and airplanes, as well as the use of North American and European ships in World War I. From 1911, the national production of the crude grew in an extraordinary way. Thus, the United States was the buyer of the 80% of the Mexican crude and rest 20% was sold to Latin American countries and England.<sup>367</sup> To 1921 25% of the world-wide oil production came from Mexican wells.<sup>368</sup> The oil industry continued growing in Mexico, Pearson left the business in the decade of 1910 and Doheny managed to survive years but the revolution made that the existing companies transferred the control of the industry to the great transnational partnerships. A new and complex stage of unexpected consequences for the oil history of Mexico was about to begin.<sup>369</sup>

On the fall of Porfirio Díaz, on the 3 June 1912, the revolutionary government of President Francisco I. Madero issued a decree in order to establish a special tax on the oil production. Later, he ordered to carry out a registry of the companies that operated in the country. There were registered companies which controlled the 95 percent of the business.<sup>370</sup>

To 1915, Venustiano Carranza created the Technical Commission of Petroleum and in 1917, the new Political Constitution of the United States of Mexico determined the direct control of the Nation on all the wealth coming from the subsoil. A year later, the government of Carranza established a tax on oil lands and contracts to exert control of the industry and to reclaim what was alienated by Porfirio Diaz, fact that caused the protest and resistance of the foreign companies.<sup>371</sup>

With the oil growth, the companies appropriated lands with petroleum. For this reason, the government of Carranza arranged that all the oil companies, and the people dedicated to exploration and exploitation of petroleum, would have to be registered in the Ministry of

<sup>367</sup> Alvarez de la Borda, Joel, Op.cit. footnote No. 346, pp. 46.

<sup>368</sup> Meyer, Lorenzo, “México y los Estados Unidos en el Conflicto Petrolero, 1917-1942, El Colegio de México, México, 1972., p. 24.

<sup>369</sup> In 1918 el Aguila realized that the well Num 4 of Potrero del Llano, which practically provided the refineries, was finishing. The wells of the Huasteca showed the same behaviour, reason why Pearson and Doheny transferred the control of their companies to the Royal Dutch-Shell and the Standard Oil. Now the Mexican oil industry was under the control of the great international partnerships and within a scheme of vertical integration. A new and complex stage of unexpected consequences for the oil history of Mexico was about to begin. Alvarez de la Borda, Joel, Op.cit. footnote No. 346, pp. 107.

<sup>370</sup> See “the History of Petróleos Mexicanos”, at <http://www.PEMEX.com>.

<sup>371</sup> “the History of Petróleos Mexicanos”, at <http://www.PEMEX.com>.

Promotion. To 1920, there were 80 producing oil companies and 17 exporters existed in Mexico, which capital was integrated in 91.5% of Anglo-Americans. The second decade of the century was a time of febrile oil activity, which had an ascending trajectory until arriving at a production of crude of little more than 193 million barrels, which placed Mexico as the second world-wide producer, thanks to the discovery of terrestrial deposits that were called “Faja de Oro” (Strip of Gold). This strip went from the north of the State of Veracruz to the State of Tamaulipas.<sup>372</sup>

### Faja de Oro



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One of the most spectacular wells of the oil history of the world was “Cerro Azul No. 4” (Blue hill no. 4), located in lands of the Hacienda of “Toteco” and “Cerro Azul”; property of the “Huasteca Petroleum Company”, which has been one of the most productive oil mantles at world-wide level. This well obtained a production, up to the 31 December 1921, of little more than 57 million barrels.<sup>374</sup>

The second decade of the century and the first years of the third decade were of particular meaning for the Mexican oil industry, because in the middle of the revolutionary turbulence, the state tried to regulate the exploitation of the crude, exactly when the extraction of petroleum by the companies achieved an unsuspected success. Therefore, the time that included from 1910 to 1922 was denominated the “the golden age” of the oil industry in Mexico. With the outbreak of World War I in 1914, the manufacture of automobiles began in series and the Mexican deposits could satisfy the increasing demand

<sup>372</sup> “the History of Petróleos Mexicanos”, at <http://www.PEMEX.com>.

<sup>373</sup> This is a map of the Faja de Oro, taken from: <http://3.bp.blogspot.com/FajadeOro.jpg>.

<sup>374</sup> “the History of Petróleos Mexicanos”, at <http://www.PEMEX.com>.

of hydrocarbons, consequently Mexico got to occupy an important place between the oil producing countries.<sup>375</sup>

Below there are two tables in which one can clearly see the evolution, the golden age and the decline in the oil industry before the expropriation.

**Table No. 1<sup>376</sup>**  
**Oil Production (1901-1910)**

Year	Barrels	Cubic Meters.
1901	10,345	1,645
1902	40,200	6,395
1903	70,345	11,983
1904	125,625	19,972
1905	251,250	39,944
1906	502,500	79,889
1907	1'105,000	159,777
1908	3'932,900	625,262
1909	2'713,500	431,399
1910	3'634,080	577,755
1911	12'552,798	1'995,675

**Table No. 2<sup>377</sup>**  
**Oil Production (1912-1937)**

Year	Barrels	Exports (%)	Domestic Consumption (%)
1912	16'558,215		
1913	25'692,291		
1914	26'235,403		
1915	32'910,508		
1916	40'545,712	90.0	10.0
1917	55'292,770		
1918	63'828,326	81.0	19.0
1919	87'072,954		
1920	157'068,678		
1921	193'397,587		
1922	182'278,457	99.0	1.0
1923	149'584,856		
1924	139'678,294	89.3	10.7

<sup>375</sup> Celis Salgado, Lourdes, Op.cit. footnote No. 343, pp. 63.

<sup>376</sup> Celis Salgado, Lourdes, idem., pp. 60.

<sup>377</sup> Celis Salgado, Lourdes, idem., pp. 76.

1925	115'514,700		
1926	90'420,973	89.5	10.5
1927	64'121,142		
1928	50'150,610	79.0	21.0
1929	44'687,887		
1930	39'529,901		
1931	33'038,853	70.0	30.0
1932	32'805,496	62.5	37.5
1933	34'000,830		
1934	38'171,946		
1935	40'240,563		
1936	41'027,915		
1937	46'906,605	61.0	39.0

### 3.6.7.1.2 The Mexican Petroleum Expropriation - 1938.

#### 3.6.7.1.2.1 The Conflict.

From 1910, acute tensions from the oil transnational partnerships were easily felt. Around 1935, 20 oil companies operated in Mexico,<sup>378</sup> all of them of foreign nationality,<sup>379</sup> except from Petromex<sup>380</sup> and some small producers. Each company had its own Labour Contract with its employees and workers, so that, there were as many contracts as companies existed.<sup>381</sup> This obviously brought a great discord between the workers of diverse companies since the labour benefits between each other were very different.<sup>382</sup>

<sup>378</sup> Within these companies they are: (i) Cía Mexicana de Petróleo el “Aguila”, S.A., (ii) Huasteca Petroleum Company, (iii) Mexican Gulf Oil Company, (iv) Penn Mex Fuel Oil Company, (v) Compañía Petrolera del Agwi, S.A., (vi) Grupo Imperio, (vii) Mexican Sinclair Petroleum Corp., (viii) La Sinclair y la Standard, (ix) Sinclair Pierce Oil Company, S.A., (x) California Standard Oil Co. de México, (xi) Standfor y Compañía Sucrs., (xii) Richmond Petroleum Company of Mexico, S.A., (xiii) Compañía Explotadora de Petróleo La Imperial, S.A., (xiv) Compañía de Gas y Combustible Imperio y Empresas; (xv) Consolidated Oil Companies of Mexico, S.A.; (xvi) Sabalo Transportation Company, S.A.; (xvii) Mexican Gulf Petroleum Company. To know further information of these companies. “El Petróleo de México”, Tomos I, II y III, Gobierno de México, 50 aniversario, PEMEX, Primera Edición 1940, Edición Conmemorativa, Mexico, 1988.

<sup>379</sup> The first place, considering its investments and its production, was occupied by Compañía Mexicana de Petróleo El Aguila, which was subsidiary of the Royal Dutch Shell; the second place was occupied by the Huasteca Petrolera Company, a subsidiary of the Standard Oil Company of New Jersey, and the third place by the Sinclair. In addition, the Standard Oil of California, branch of the one of New Jersey; the Sabalo Transportation Company, el grupo Imperio, la Mexican Gulf, the Mexican Gulf and others more. Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 9

<sup>380</sup> See infra pp. 222.

<sup>381</sup> In the case of the Compañía Mexicana de Petróleo El Aguila, it was divided into ten different companies. Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 9

<sup>382</sup> In order to make an analysis of the salaries of the oil industry settled down in Mexico, the necessity to divide in three groups the workers who participated in the Mexican oil industry was considered: in refineries, in fields and in the distribution, including production fields. This same classification is used in the United States, where in addition two more categories are added: those of the construction and those of the conservation of pipe lines. See this analysis at “El Petróleo de México”, Tomos II, Gobierno de México, 50 aniversario, PEMEX, First Edition 1940, Edición Conmemorativa 1988, Mexico, pp.491.

On the 2 January 1935, after having gotten the power the General Lázaro Cardenas, the concessions previously granted to El Aguila were declared non-existent. Such concessions had been granted by Porfirio Diaz to the English contractor Weetman Dickinson Pearson who never used them. Later on, the Shell company used them to evade taxes and to import equipment under its name.

There was an authoritarian and annoyance atmosphere from the hydrocarbons international trusts, which seemed determined to settle beyond legality in which the institutions created by the Mexican Revolution lean.

Mr. Miguel Alemán Valdez, when taking possession as new governor of the State of Veracruz on the 1st. of December of 1936, said “we do not have to fear to a new Hernán Cortez”. In the United States, Roosevelt was reelected as president, who promulgated a policy of “Good Vicinity”, proposing a new treaty with a continental scope. The Latin American countries feel confident, reanimated and optimistic.

The United States announces to reject the old habit, to unilaterally impose their determinations to the countries located to the south of the bravo river. The safe acceptance of the principle of non-intervention, done by Washington, appears as the article given by President Roosevelt as the sincerity of his international expositions as well as his policies of neutrality in world-wide subjects.

Thus, in 1936 a Pan-American conference in the city of Buenos Aires was held, based in the neutrality that assures peace in this part of the world. The fundamental act of the Buenos Aires conference is the consecration of the principle of non-intervention in the internal or external subjects of any of the American states. The agreements approved in Buenos Aires open a new chapter in the continental relations.

Cordell Hull, former Secretary of State of the White House, with his solemn characteristic style, mentioned the “eight pillars for Peace: Education of the towns for Peace, frequent inter-American conferences, application in the continent of the Kellog-Briand pact, a hemispherical policy of neutrality, the adaptation of the commercial policies of the American republics, a practical international operation, the commitment to fortify the international law and the faithful observance of treaties.”<sup>383</sup>

In 1936, The North American ambassador in Mexico, Josephus Daniels attended the taking of possession of the new Governor in Veracruz in Jalapa-Enriquez. In such an event Mr. Miguel Alemán Valdez mentioned “the peace atmosphere with foreign countries, makes a

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<sup>383</sup> Alemán Valdés, Miguel, “La Verdad del Petróleo en México”, Reedición Conmemorativa del 25 Aniversario Luctuoso del Presidente Miguel Alemán Valdés (1946-1952), Biblioteca Mexicana de la Fundación Miguel Alemán, A.C., México, 2007, pp. 208.



stronger obligation to elaborate, in an effective way, the real abolition of whatever in our world means subjection to imperialism.”<sup>384</sup>

The oil partnerships upset with the Mexican Revolution were ready to fight against the taken decision at all costs. On one hand, the government unconditionally supports the workers organization, which serves the foreign companies dedicated to the exploitation of hydrocarbons.

On the other hand, there was enterprise nonconformity with the tax system. The government reiterates the idea to reserve the confirmation on the subsoil. The union organization of the petroleum workers demands better wages and elementary social benefits, and makes public the stingy repayment that the companies maintain for their workers and the terrible and subhuman conditions of life that native workers in the oil campings must support.

The international partnerships have been using, from decades back, the operation of hydrocarbons of Mexican subsoil, situation to which the new governor of Veracruz began to face up.

In 1935, the regime of Cárdenas achieved that the petroleum workers (dispersed in 19 independent unions) be unified in the “Sistema de Trabajadores Petroleros de la Republica Mexicana” (STPRM) (Union of the Oil Workers in the Mexican Republic).<sup>385</sup> Meanwhile, the foreign companies decided a policy of belligerent delay.

The unique union of oil workers is affiliated to the CTM<sup>386</sup> and in July of 1936 the first general assembly was inaugurated in Mexico City. The outcome of this meeting was a project of a work collective contract for the petroleum workers. The unions presented the project to the companies and they serve a notification to strike if a satisfactory agreement is

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<sup>384</sup> Alemán Valdés, Miguel, *idem.*, pp. 209.

<sup>385</sup> The Union of oil workers in the Mexican Republic was set up in 1935, which antecedents go back to 1915. Until January 1989 it was called the Revolutionary Union of Petroleum Workers of the Mexican Republic. The participation of the Union in the post-election conflict called PEMEXgate was investigated in 2001. In 2001, it was discovered that funds from the Union of Oil Workers in the Mexican Republic, were indiscriminately used to finance the presidential campaign of Francisco Labastida, candidate for the Institutional Revolutionary Party (PRI) in 2000. While those responsible were not presented to justice, the party was fined with 1,000 million pesos (about US \$77 million). The press named the scandal PEMEXgate, as a pun in reference to the American Watergate political scandal.

<sup>386</sup> The Confederation of Mexican Workers (Confederación de Trabajadores de México (CTM)) is the largest confederation of labor unions in Mexico. For many years it was one of the essential pillars of the PRI, which ruled Mexico for more than seventy years. However, the CTM began to lose influence within the PRI structure in the late 1980s, as technocrats increasingly held power within the party. Eventually the union found itself forced to deal with a new party in power after the PRI lost the 2000 general election, an event which drastically reduced the CTM's influence in Mexican politics. Over the years the CTM has also lost much of its power within the workplace, increasingly being more agreeable to employers' moves aimed to increase productivity. Workers have usually received little benefit from these agreements, as real wages have generally fallen over the past several decades. Moreover, the CTM has become increasingly corrupt and conservative over the years, often serving to impede workers' efforts to organize independent unions.



not arrived. The companies refuse to discuss the proposal with the union and the conflict is finally arisen.

President Cárdenas went personally to the parties to reach an agreement and on the 27 November 1936 a convention was held to jointly study the project of the collective contract. The oil employers described as “outlandish” the demands contained in the contract project.

On the 6 of October of that year the government promulgated the law of expropriation approved by the congress in developing of an unobjectionable interpretation of the constitutional texts.<sup>387</sup> The oil companies, totally upset, classified the new law of unconstitutional.

Mexico, following the wording of article 27 of the Constitution, took the intention ahead to give its natural resources a dynamic function to the service of the nation, with total respect to the foreign capital.

The regime of Cárdenas revitalized the idea of President Abelardo L. Rodríguez. President Cárdenas exposed before the Congress, in 1935, that the sense of the initiative was to boost the development of Mexican oil companies,<sup>388</sup> and to seek to take the control of the operation of wells, the handling of refineries, the administration of the transport of fuels and its national and international distribution.

To sum up, the following were the proposed important changes: (i) the creation of the Expropriation Law; (i) the lay down the direction of hydrocarbons exposed in the six-year Plan; (iii) the establishment of *Petróleos Mexicanos, S.A.*<sup>389</sup> to which all assets were placed under control.

Josephus Daniels, North American Ambassador in Mexico, had an interview with President Cárdenas, who made clear that his government did not set out to follow a wild policy of expropriation. He noted the North American diplomat what absurd would be to expropriate

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<sup>387</sup> Article 1st. of the Expropriation Law establishes that the causes for expropriation are: (i) the satisfaction of collective needs in case of war or inner upheavals; the supplying of cities or population centres, supplies or other articles of necessary consumption, and the used procedures to fight or to prevent the propagation of epidemics, epizootias, fires, plagues, floods or other public calamities; (ii) the used strategies for the national defense or the maintenance of public Peace; (iii) the defense, conservation, development or advantage of the susceptible natural elements of exploration; (iv) the equitable distribution of the wealth monopolized with exclusive advantage of one or several people and with damage of the community, or of a class in particular; (v) the creation, promotion or conservation of a company for benefit of the community; (vi) the necessary measures to avoid the destruction of the natural elements and the damages that the property can suffer to the detriment of the community.

<sup>388</sup> The words of the President were: “As the economic development of Mexico, in all aspects, has demanded for a long time, the presence in the market of cheap fuel and lubricants, and as it has really not existed in Mexico Mexican petroleum, since the one that is sold and consumed precedes from companies with foreign capital, ideas and aspirations, it has been wanted to initiate, by means of the constitution of a net Mexican company “*Petróleos Mexicanos, S.A.*”

<sup>389</sup> See *infra* pp. 221.

the mining and oil industries. Daniels tranquilized the Department of the State with the guaranties given by the president of Mexico.

The petroleum businessmen kept informed, in a detail way, the Department of the State of the labour problem they confronted in Mexico. In spite of the intervention of Cárdenas in the subject, the unions chose to go to strike during the last days of May of 1937.

Consequently, the companies made their determination public to suspend activities. The trusts had sharpened their eyeteeth,<sup>390</sup> but for the first time since their installation in Mexico, the oil businessmen did not have the unconditional support of the diplomatic mission of their country.

The ambassador Daniels was convinced of the kindness of the Good Vicinity and considered that the partnerships had been obstinate and assumed a little scrupulous attitude in Mexico and their methods had not been always clear to acquire properties.

The Junta de Conciliación y Arbitraje (the labour Mexican Court) ordered the return of the workers to their work, and that the companies put their accounting books under the examination of a commission of experts that would determine if they could satisfy the working demands so emphatically rejected.<sup>391</sup> The oil workers argued a conflict of economic order.<sup>392</sup> With base in the meticulous report of the Commission of Experts, The Junta de Conciliación y Arbitraje issued an award.<sup>393</sup>

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<sup>390</sup> Among the main ones we found the Mellon, which controlled the Gulf Petroleum Company; the Pew, main owners of the Sun; the Rockefeller with the gigantic Standard and its branches. Alemán Valdés, Miguel, Op.cit. footnote No. 383, pp. 218.

<sup>391</sup> The three designated experts were: Mr. Efraín Buenrostro, Deputy Minister of Finance and Public Credit, who acted as President of the panel; the Lawyer Eduardo Suárez, advisor of the Ministry of Finance and Public Credit, who acted as Secretary of the Panel, and engineer Mariano Moctezuma, Minister of the National Economy, who acted as member of the Panel. Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 11.

<sup>392</sup> As fully explained by Eduardo Suarez, one of the experts who took care of the conflict, the conflict of economic order, in agreement with the applicable labour legislation, occurs when a company and its workers do not reach an agreement as for the salary increase and improvement in the benefits, when on the one hand the workers say that the company can improve the conditions in (for example) a 30%, taking into account its financial standing, because it is obtaining good utilities; and on the other hand the employers emphatically assure that they cannot accede to the demands of its personnel since the financial conditions prevent them. Casasola V. Miguel, Silva Herzog, Jesús, *idem.*, pp. 10. See the posing of this conflict of economic order in “El Petróleo de México”, Tomos I, Gobierno de México, 50 aniversario, PEMEX, Primera Edición 1940, Edición Conmemorativa 1988, México, pp.133-137.

<sup>393</sup> The experts, according to words of one of them, were discovering very interesting aspects of the Mexican oil industry. For example, they found that the Compañía Mexicana de Petróleo El Aguila sold its products to a company established in Canada that was also called El Aguila, to prices below the market. While the price of the barrel of petroleum was in New York, average, in 1936, in USD\$3.19, the company indicated above sold it to its branch in USD\$1.96, with the intention of hiding utilities and reducing the Income Tax and transferring part of the contribution of utilities to another country. Casasola V. Miguel, Silva Herzog, Jesús, *idem.*, pp. 11. See the report issued by the panel before the Junta de Conciliación y Arbitraje in “El Petróleo de México”, *idem.*, pp.137.

From the enterprise side, the company El Águila assumed the public leadership of a challenging opposition. Suddenly, in November of 1937, just when the world-wide petroleum needs had increased in a vertiginous way, the Standard Oil Company brought to an end the talks that the representatives of the companies had advanced with president Cárdenas. The companies were sure that the Mexican government would finish bending the hands if the trusts maintained their radical refusal. They considered that Mexico did not have the technical personnel required due to the complex and highly sophisticated operation of the oil industry.

On 18 December 1937 the partnerships had the first surprise with the award of the Junta de Conciliación y Arbitraje, according to which they should increase \$26'332,752.00 pesos for the workers and establish a maximum number of 1,100 confidence employees for all the companies of the field.<sup>394</sup> The companies' answer was that it was impossible for them to comply with such a provision.

The financial panic began and they retired its banking deposits. The companies presented the "amparo" procedure before the National Supreme Court of Justice against the award, which was declared inadmissible by this court; the original sentence acquired, the definitive and unquestionable character. The Supreme Court, on 1 March 1938, after studying the problem, confirmed the award of the labour authorities.

Miguel Alemán Valdés, led his colleagues of the federal states so that they offered the ample due support to the President in the oil case. On 18 March 1938 the companies reiterated before the President of Mexico their inflexible decision of not sharing, not even a small part, the administration of a natural resource of the nation.

The oil colossuses were sure that the government would not dare since Mexico was not prepared to handle the oil industry.

Nevertheless, on 18 March 1938, at 9:45 p.m. in the Yellow Room of the National Palace, the Decree of Expropriation was signed, and 15 minutes later the President addresses, via radio, the Mexicans to read it and explain it.<sup>395</sup>

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<sup>394</sup> Finally, the experts considered that the workers requested an increase based on the expenses of the companies in salaries and social benefits in the year of 1936, which reached about ninety million Mexican pesos and the companies offered to increase the benefits solely to fourteen million. So that, the difference was enormous. The panel of experts reached the conclusion that the companies could increase in salaries and other services in benefit of the workers, twenty-six million Mexican pesos. Casasola V. Miguel, Silva Herzog, Jesús, *idem.*, pp. 13.

<sup>395</sup> In his message President Cárdenas said: "the oil companies, despite the attitude of serenity of the government and the considerations that has kept to them, are obstinate in doing, outside and within the country, a deaf and capable campaign that the President let know one of the managers of the companies, and that he did not deny, and that they have given the result that the companies themselves sought: to seriously injure the economic interests of the nation, trying by this means to make the legal determinations dictated by the Mexican authorities null." Alemán Valdés, Miguel, *Op.cit.* footnote No. 383, pp. 238.

**President General Lázaro Cárdenas del Río,  
while giving the expropriation announcement**



As Miguel Alemán Valdés mentioned, with whom we totally agree, if the State had not proceeded with rapidity and firmness as it did it the evening of 18 March 1938, the consequences of a delay would have been disastrous.

The argument of the Mexican government for the expropriation was “cause of public utility”. In this procedure of expropriation the Mexican Revolution became evident, when becoming interpreter of the nation in a crucial moment of the history of the country, emphasizing the principles that governed the revolution; it means, sovereignty and national self-determination.

**3.6.7.1.2.2 International Atmosphere.**

The world-wide frame of the time was nothing encouraging. We were in the presence of a planet convulsed by the aggressions to the international order and to the right of the totalitarian governments of Germany, Japan and Italy. The colossal military apparatus of the Nazi Germany, seconded by the armies of Mussolini and the uncontrollable forces of sea, air and earth that Japanese militarism unfolded was the atmosphere of the world. The Spanish Republic succumbed in the horrors of the civil war, which had beginning on 17 July 1936.

The Society of Nations had failed in its mediation attempts in Europe. Mussolini retired Italy of the Society of Nations to deceive the sanctions that the organism had decided as its sentence to the aggression against Ethiopia.

<sup>396</sup> This is a picture of President General Lázaro Cárdenas del Río, while giving the expropriation announcement, via radio, taken from: [http:// 1.bp.blogspot.com/.../uVycHmpcQfY/s1600/63b.jpg](http://1.bp.blogspot.com/.../uVycHmpcQfY/s1600/63b.jpg).

1938 was not a good year for the world, the Nazi territorial expansionism got ready a project on neighbouring countries with an overwhelming military device, that sought to justify the superiority of the Aryan race.

On 11 March 1938 the Anschluss (meeting) of Austria is held, in open violation of the Treaty of Versailles. The Austrian Nazi Seyss-Inquart<sup>397</sup>, invited the German army to occupy his country. The underflow of the Hitler violence was uncontrollable. On 18 March 1938, the same day that the oil expropriation in Mexico was declared, Hitler tried to justify before the world the violation of the independence of Austria.

In Rome, Mussolini declared before the fascist camera that “when an event is fatal, is better it takes place with our consent than with our regret; or what would be worse, against us”.

England was doomed to the voluntary abdication of Eduardo VIII. The economic crisis was followed by the dynastic crisis. If the domestic and foreign policy of the United States had been reoriented by Roosevelt towards the doctrine of the New Deal and the postulates of the Good Vicinity, in England the government of Chamberlain stayed anchored to the traditional principles and the powerful imperialistic interests of British conservatism, defending at any cost the Shell that operated in Mexico through El Aguila. Thus, there were two oil political directions very different from each other, the one of the White House with President Franklin D. Roosevelt and the one of 10 Downing Street with Neville Chamberlain.

The great leaders of the hydrocarbon industry were not less addict to Nazism. Henry Deterding, founder of the Royal Dutch, economically helped Hitler, with a strong donation of money, in 1933 and 1937, to get the power.

### **3.6.7.1.2.3 The Decree of Expropriation.**

In the text itself of the Decree of Expropriation,<sup>398</sup> it is transparent the absolute lack of premeditation of the decision. Of great importance are Articles First<sup>399</sup> and Third<sup>400</sup> of this

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<sup>397</sup> Arthur Seyss-Inquart (22 July 1892– 16 October 1946) was a Chancellor of Austria, lawyer and later Nazi official in pre-Anschluss Austria, the Third Reich and for wartime Germany in Poland and the Netherlands. At the Nuremberg Trials, he was found guilty of crimes against humanity and later executed.

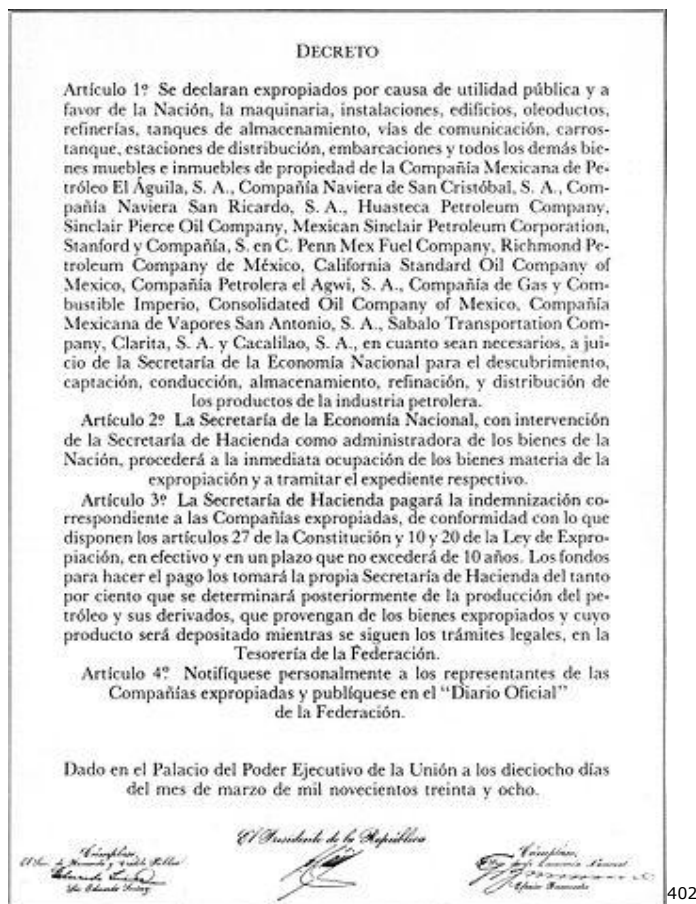
<sup>398</sup> The Expropriation Decree can be consulted at: Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 64 y 65.

<sup>399</sup> Article First of the Decree establishes: “They are declared expropriated based on a public utility cause and in favour of the nation, the machinery, facilities, buildings, pipe lines, refineries, storage tanks, communication channels, cars tanks, distribution stations, boats and all the other properties of the companies that are next enunciated: Compañía Mexicana de Petróleo El Aguila, S.A., Compañía Naviera de San Cristobal, S.A., Compañía Naviera San Ricardo, S.A., Huasteca Petroleum Company, Sinclair Pierce Company, Richmond Petroluem Company, California Standard Oil Company, Compañía Petrolera el Agwi, S.A., Compañía de Gas y Combustible Imperio, Consolidated Oil Company, Compañía de Vapores San Antonio, S.A., Sabalo Transportation Company, Clarita, S.A. y Cacalilao, S.A.”; The expropriation does not include a: Mexican Petroleum Co. Of California, Trans Continental Petroleum Co., Ulyses Petroleum Co., and Gulf Oil Co.”



Decree. In the morning of the following day, the ambassador of the United States in Mexico Josephus Daniels, sent a telegram to the Secretary of State in which he enumerated the expropriated companies and he recognized that the decree is based on the companies' refusal to accept the award.<sup>401</sup>

### The Decree of Expropriation



On the following day, the 19 March 1938, the Mexican Ministry of Foreign Affairs handed to the ambassador Josephus Daniels, and to the plenipotentiary minister Owen St. Clair O'Malley, a memorandum addressed, respectively to the North American Department of State and to the English Foreign Office, in which the Mexican government reiterated the recognition of his obligation to compensate the expropriated companies according to

<sup>400</sup> Article Third establishes that Mexico "will pay the corresponding indemnification to the expropriated companies, in accordance with what is foreseen by articles 27 of the Constitution and 10 and 20 of the Law of Expropriation, in cash and within a term that will not exceed 10 years."

<sup>401</sup> Moments before the expropriation, the oil companies still sent personnel to President Cárdenas to inform him that they could pay, indeed, the 26 million. Obvious the conflict was out of hands and it was already behind schedule for that offer.

<sup>402</sup> This is the Decree of Expropriation, taken from: [http://upload.wikimedia.org/wikipedia/commons/thumb/d/d7/Decreto\\_Expropiatorio.jpg/350px-Decreto\\_Expropiatorio.jpg](http://upload.wikimedia.org/wikipedia/commons/thumb/d/d7/Decreto_Expropiatorio.jpg/350px-Decreto_Expropiatorio.jpg).

national law, and declared, in addition, to be willing to reimburse the expenses they had made in the legal proceedings to obtain concessions not yet operated by them. The reactions did not wait and came spiny threats, describing the expropriation as a “robbery” and of in moments less anger as “embargoes”.

The oil Trusts forced their advertising means to the maximum and used powerful influences in all the levels of the United States, Great Britain, Europe and Mexico. The analysts from London recognized that they had the great barrier of the Monroe Doctrine,<sup>403</sup> usual in the past, which prevents a direct military action. The oil companies did not discuss the right of a government to nationalize private property, as long as it is of public utility cause and thru a quick, effective and adapted indemnification. But the attitude of London is radical, the Foreign Office denied that the expropriation became with public utility cause.

President Cárdenas received the national and popular support and set out his reasons before London, based in the approved Law of Expropriation and the Decree of Expropriation, which insisted on its constitutionality and attachment to Mexican legislation.

The English government took the position to arrange the boycott to Mexican hydrocarbons and its derivatives and doubted the capacity of the Mexican government to cover the oil indemnification. Mexico, in May of 1938, was forced to break relations with that European country.<sup>404</sup>

The armed conflict took place in San Luis Potosí and the government attributed it to the oil partnerships. President Cárdenas directed the combat operations personally. Mexico tried to sell petroleum to France and Holland, but it was seized when arriving at port due to demands of the oil partnerships, who alleged that it was stolen petroleum. The situation every day became more critical. Cuba served in some cases as a bridge for these exchange operations. Italy built for Mexico, in shipyards of Genoa, three oil ships in exchange for fuel. The people in charge of the new administration of the nationalized industry performed important imagination tasks to deceive the boycott and be able to sell into the United States small amounts of petroleum and asphalt, which sometimes must have been

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<sup>403</sup> The Monroe Doctrine is a policy of the United States introduced on 2 December 1823. It stated that further efforts by European nations to colonize the land or interfere with states in North or South America would be viewed as acts of aggressions requiring US intervention. The Doctrine noted that the United States would neither interfere with existing European colonies nor meddle in the internal concerns of European countries. The doctrine was issued at a time when nearly all Latin American colonies of Spain and Portugal had achieved independence from Spain Empire. The United States, working in agreement with Britain wanted to guarantee no European power would move in. The doctrine was named after President James Monroe.

<sup>404</sup> The Mexican government sent the following message to his diplomatic team in London: “Legamex, London. Please immediately communicate the Foreign Office that on the occasion of the little friendly attitude of the British government in several acts against the government of Mexico, regarding the expropriation of the petroliferous fields, that the government of our country was forced to realize, due to the revolt and that the companies refused to obey the failure of the Supreme Court, you have received orders to retire from England and to close the Mexican Representation. Stop”. Alemán Valdés, Miguel, Op.cit. footnote No. 383, pp. 286.



delivered thru the Panama Canal. The implacable campaign for losing prestige was technically planned to strike the economy of Mexico. The tourism entrances descended in a 35% in relation to 1937, but the government of Cárdenas was firm and solid in the irreversibility of the expropriation decree. General Cárdenas shared totally the pacifist convictions of Roosevelt and Mexico was forced to sell hydrocarbons and derivatives to Germany since the Anglo-Americans trusts closed the doors to Mexico in democratic markets.

#### **3.6.7.1.2.4 After the Expropriation.**

The changes were sudden and the new proprietor of the oil industry in Mexico had to make fast decisions in the subject. Thus, on the 19 of March all the specialized technicians and directors of the foreign companies had already left. In the same date, there was not a single boat-tank in Mexican ports, and the car-tanks were already crossed the border leaving this country back. The problem now was dreadful for the Mexican government, but it found practical solution by the improvisation of the technicians. The sergeants were named colonels or generals of divisions.<sup>405</sup> Old boats were bought, as a Cuban boat that had capacity for six thousand barrels and was baptized as “Cuauhtémoc”. Another boat, San Ricardo, which was in repair in Mobile, Alabama, was brought after a long litigation. It was flagged with the Mexican insignia and it was baptized as the “the 18 of March”. This last boat had a capacity of 10 thousand barrels.

On the other hand, the terrestrial problem appeared since there was not the form to distribute petroleum with such a reduced number of so car-tanks, but the rail workers demonstrated great fervour and effectiveness moving trains and the country was never ran out of gasoline. Luckily, all these problems found a solution relatively fast; nevertheless, the serious problems came from the outside, where the companies, which goods were expropriated, organized a boycott against the country,<sup>406</sup> by threatening those companies that could buy petroleum from the Mexican government, as well as those that could provide it with machinery and spare parts. Mexico was able to sell important amounts of asphalt and petroleum to Holland and France, but when arriving the sales at the corresponding ports, these were seized due to the intervention of the companies, arguing that it was stolen petroleum.<sup>407</sup>

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<sup>405</sup> A case is mentioned on the matter, Mr. Federico Aznar, distributor of gasoline in Mexico City, leader of prestige in the refinery of Azcapotzalco, was designated superintendent of that refinery and performed with effectiveness his new position. Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 62.

<sup>406</sup> Besides the economic boycott by means of which commercial barriers for the sale of Mexican petroleum settled down, the foreign companies, mainly the Standard Oil Company of New Jersey, was in charge of publication in order to attempt against the new Mexican oil industry; within those publications are mentioned the magazines “the Lamp”, “the Atlantic Monthly”, in Mexico the magazine “the Economist”, where the action of the new operator of the Mexican oil industry was slandered. Casasola V. Miguel, Silva Herzog, Jesús, idem., pp. 88.

<sup>407</sup> Casasola V. Miguel, Silva Herzog, Jesús, idem., pp. 85-88.

As mentioned by Owen Anderson, an international boycott on Mexican oil after Mexico's expropriation of oil company took place in 1938. Deprived of international markets and access to new technology, Mexico, once the second largest oil producer in the world, lost its status as a major oil producer for the next quarter of a century.<sup>408</sup>

Finally and in spite of the attempts of the foreign oil businessmen to discredit the expropriation, the North American government considered that Mexico had carried out such act in agreement with its laws, demanding only that the payment was made fairly and quickly. On the other hand, the English government sent a protest note dated on 9 April 1938, through which it attacked Mexico for not having paid a sum of a little more than 300 thousand dollars to England. The reason of the annoyance of the English government was that the *Compañía Mexicana de Petróleo el Aguila* was a company with predominantly English capital, and it was even said that the government of Her Majesty had a great number of shares. The Mexican government immediately gave England a check on this amount and remembered England that Mexico was not the unique country that was in delay of the payment of its debts.

Little by little the Mexican oil industry was recovering and at some time new clients began to appear. So, asphalt was sold to some companies, later on petroleum was sold to the refiner company called Eastern State Petroleum Company of Houston. The Mexican government insisted on selling its products to the Democracies as it was the case of France, to whom it informed that in case of not selling its products to the democratic countries it would be forced to sell it to the powers of the Axis, highlighting that if that fuel was sold to Germany, it would be used in the airplanes that would attack France. The Italian government directly bought products in Mexico with whom, as mentioned before, it was agreed to give petroleum and derived products in exchange of three oil boats. A little later it changed with Italy petroleum for "artisela". Although it is certain that Mexico finally had Germany as a client, with whom exchanged petroleum and its derivatives for bridge structures and heavy German industry products. It is also true that the sold amounts were small in comparison to the petroleum sold by the own Standard Oil Company of New Jersey, who, according to Miguel Casasola, its products helped to assassinate North American young people during the war, describing the fact as "antinomies of the society we lived."<sup>409</sup>

Another client was the Cities Service Company, which bought, in one first occasion, a million five hundred thousand crude petroleum barrels from Pánuco, which is one of the best in the world to produce asphalt. In the United States, it was sold to the First National Oil Corporation, company with base in New York that bought twenty million barrels to provide diesel oil to warm up buildings. Also, there were some small sales to Brazil, Argentina, Uruguay, Guatemala and Japan.

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<sup>408</sup> Anderson, Owen, Chapter 10, Smith, Dzienkowski, Anderson, Conine, Lowe, Kramer, Op.cit. footnote No. 186.

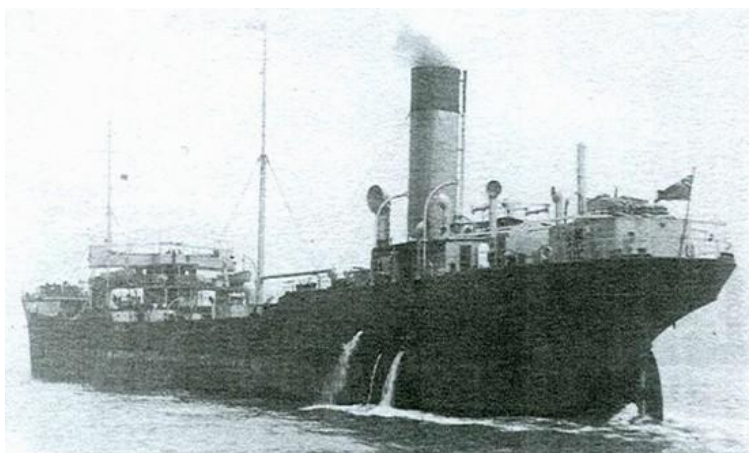
<sup>409</sup> Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 91

When increasing the sales, it was necessary to count on with more boats. Thus, little by little, more boats were bought as two Norwegians with capacity of 10 thousand barrels each.<sup>410</sup> The first boat, that worked with diesel engine was baptized as “Cerro Azul”, which arrived Tampico already commanded by Mexican crew. The following Norwegian boat was called “Tampico” and arrived at this port a month later.

Once the recovery of the expropriation began, the Mexican government had to take care of the payment to the expropriated companies. Thus, in 1940 talks began in New York and Washington with the representatives of Consolidated Oil Corporation,<sup>411</sup> it means, the company of Sinclair in the United States, on the one hand and, the Mexican government on the other, represented by the working leader Lewis, Eduardo Suárez, the Ambassador Castillo Nájera and Miguel Casasola. The talks, after long negotiation and working time, concluded in the amount of eight million five hundred thousand dollars that the Mexican government had to pay to this company, deciding the payment with petroleum during next five years. The amount that the North American company requested at first was eighteen million dollars.<sup>412</sup> It is important to emphasize the use of negotiations, as an alternative dispute resolution method in such an important conflict 70 years ago.

On 21 May 1942, the unescorted and neutral boat named “Faja de Oro”, property of Pemex, was hit in the foreship by one of two torpedoes from U-106 off Key West. At 04.33 hours, a first coup de grâce missed but after 20 minutes a second one hit amidships, setting the ship on fire and caused her to sink shortly afterwards. On 1 Jun 1942, Mexico declared war on Germany after two Mexican tankers had been sunk by U-boats: Potrero del Llano by U-564 (Suhren) on 14 May and Faja de Oro by U-106 (Rasch) on 21 May.

### Vessel “Faja de Oro”



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<sup>410</sup> Each boat cost six hundred thousand dollars and they were delivered in Mobile, Alabama.

<sup>411</sup> Remember that this company was the third investor in the Mexican oil industry.

<sup>412</sup> See details of the negotiation in Casasola V. Miguel, Silva Herzog, Jesús, Op.cit. footnote No. 340, pp. 98-101.

<sup>413</sup> Completed in February 1914 as British Barneson for Bank Line Ltd (Andrew Weir & Co), Glasgow. 1915 renamed Oyleric for Andrew Weir & Co, Glasgow. 1937 sold to Italy and renamed Genoano for Ditta G.M.

Subsequent to 1948, new important oil deposits appeared and it began the development of fields in Reynosa, Tamaulipas. The Northeast region was therefore created, where vast reserves of gas and petroleum existed. The following year the same happened in the western region of Tabasco, but the greatest discovery was the called “la Nueva Faja de Oro” (the New Gold Strip), located to the south-east of the Old Gold Strip, becoming the most productive region with a 50% of the new fields in 1953 and 1956.<sup>414</sup> These discoveries consequently brought an increase in the production and in the volume of reserves,<sup>415</sup> as well as in the industry of the refineries.<sup>416</sup> On the other hand, the transport capacity was also affected and forced to receive improvements. New pipe lines were constructed<sup>417</sup> during the management of Bermúdez.<sup>418</sup> The marine and railway transport increased considerably.<sup>419</sup>

From 1970 a new and ambitious program of development perforations was initiated, with the objective to mainly intensify the operation of the “mantos de Reforma” (Reformation mantles) (Chiapas- Tabasco),<sup>420</sup> located some years back at the continental platform of Campeche.

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Barbagelata, Genoa. On 8 Dec, 1941, seized at Tampico by Mexico and renamed Faja de Oro. Picture taken from: [www.uboaat.net](http://www.uboaat.net).

<sup>414</sup> Meyer, Lorenzo y Morales, Isidro, Op.cit. footnote No. 343, pp. 116.

<sup>415</sup> In 1945 the annual production of crude of the Mexican fields had been of 43,5 million barrels and the total hydrocarbon reserves, including crude and natural gas, represented 1.276 million barrels. In 1946 these numbers had risen to 49,2 and 1.437 million barrels for each category. For 1958 the production was already of 93,5 million and the reserves were over 4 billions. Alvarez de la Borda, Joel Alvarez, “Crónica del Petróleo en México. De 1863 a Nuestros Días”, PEMEX, Archivo Histórico de Petróleos Mexicanos, Primera Edición, México, 2006, pp. 99.

<sup>416</sup> In 1938 six refineries in operation existed, five of which were located in the coastal zone of the Gulf (Mata Redonda, Arbol Grande, Minatitlán, Ciudad Madero y Poza Rica) and one in Azcapotzalco, that was the refinery of the capital that in 1938 and 1946 had a capacity of 13 thousand and 20 thousand daily barrels, respectively. This refinery was dismantled and a new one was built that began to operate in this last year with a capacity of 50 thousand barrels a day. In 1955 its capacity was extended again to 100 thousand barrels. This plant had the greater amount of installed equipment and produced the aviation fuel that was consumed in the country. In the same way, the old refinery of Minatitlán was rebuilt to increase its production to 50 thousand daily barrels and in the other plants improvements were made to lift the quality of the production. In 1950 PEMEX built two new refineries, one in Salamanca and the other in Reynosa. With all these advances, PEMEX increased the total volume of primary distillation in 315% and the production with base in the catalytic disintegration in 369%. Alvarez de la Borda, Joel Alvarez, idem., pp. 99 - 103.

<sup>417</sup> The most important pipe lines built during this time were those of Poza Rica-Azcapotzalco (1946), Poza Rica-Salamanca (1950), Minatitlán-Santa Cruz (1951) y Tampico-Monterrey (1956). Alvarez de la Borda, Joel Alvarez, idem., pp. 99 - 103

<sup>418</sup> Bermúdez was General Director from 1946 to 1958.

<sup>419</sup> In 1946 PEMEX had to its service 1,561 car-tanks and in 1957 it had 2,130. In 1950 it counted on 141 tankers and for 1957 the number of these units arrived at 400. Finally, during these years PEMEX increased the number of its marine fleet from 12 to 18 ship-tanks. Meyer, Lorenzo y Morales, Isidro, Op.cit. footnote No. 343, pp. 266-269.

<sup>420</sup> The Reforma fields initiated their production in 1972 and in 1974 they caused the rise of the national production, that in that year reached the 209,8 million barrels, number that broke for the first time the record marked in 1921 of 193,3 million barrels. For 1978 this region provided 79% with the total production of the country. Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 117.



**Former President General Lazaro Cárdenas with,  
amongst others, Ing. José Rodríguez Garza**



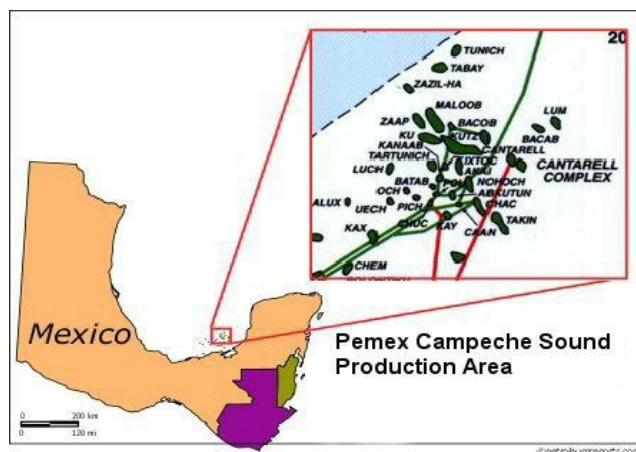
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**3.6.7.1.3 The New Era – Cantarell and Ku-Maalob-Zaap.**

In 1971 a fisherman from Campeche, Rudecindo Cantarell informed PEMEX the discovery of an oil spot that came up from the bottom of the ocean in Sonda de Campeche. The marine field was denominated Chac. Eight years later another oil spot was discovered the name was "Akal", which was an extension of the Chac Mantle. The production of the Chac well and Akal well would mark the principle of the operation of one of the greatest oil marine deposits of the world: Cantarell.

<sup>421</sup> This Picture was taken on Morelia Michoacán, México in 1952. In the centre of the table one can recognize former President General Lázaro Cárdenas, to his right was Don Nazario Ortíz Garza, who was Governor of the State of Coahuila, Ministry of Agriculture, and a very well recognized businessman in the wine industry. To the left side of the picture there is a man wearing glasses, looking at the floor who happens to be my grandfather, José Rodríguez Garza, who used to work directly with Mr. Ortíz Garza. At the bottom of the picture there is a dedication written by former President Cárdenas' hand which says: "A mi estimado amigo Ing. José Rodríguez Garza": in English: "to my dear friend Ing. José Rodríguez Garza".

## The Cantarell complex.



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The increase of the production, without precedents, allowed PEMEX, in the year of 1974, to renew the exports suspended by eight years, reaching to export in 1983 the unusual proportion of 58%, which ranked PEMEX as a good crude exporter.<sup>423</sup>

In 1979, the perforation of the Maalob1 well confirmed the discovery of the second more important deposit of the country, after Cantarell. The active Ku-Maalob-Zaap which is the twenty third world-wide level, in terms of reserves, equivalent to 4,786 million barrels of crude.

The situation justified the opening of new refineries, first it was the “Miguel Hidalgo Plant”, installed in the municipality of Tula with an initial production of 150 thousand daily barrels. It had the intention to replace the refinery of Azcapotzalco as supplier of the central region of the country. With the purpose to provide the North region of the country and the coast of the Pacific they opened the refinery of Cadereyta, in Nuevo León and Salina Cruz, Oaxaca, which around 1981, they could process 235 thousand and 170 thousand daily barrels. This increased the capacity of refinement of PEMEX to 1,52 million daily barrels and a self-sufficiency level to 99,1%.<sup>424</sup>

The oil deposits of Reforma and Cantarell contributed 93% of the 1,002 million barrels up to which the national production in 1982 reached<sup>425</sup> an amount which was not surpassed

<sup>422</sup> This is a map of the Cantarell complex, taken from: [www.ingenieriapetrolera.com/.../04/cantarell.jpg](http://www.ingenieriapetrolera.com/.../04/cantarell.jpg).

<sup>423</sup> The administration of Jorge Díaz Serrano (1976-1981) focused to the export of crude as a fundamental axis of its expansion. During the first year of its administration PEMEX increased the sales to the outside in a 57% in relation to the previous year. Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, 2006, pp. 121.

<sup>424</sup> PEMEX, Agenda Estadística, 1988, PEMEX, Memoria de Labores, 1981.

<sup>425</sup> To this year, PEMEX counted on with 92 Plants grouped in 17 petrochemical complexes. Amongst these plants are the Cosoleacaque (ammonia), Pajaritos (ethylene and derivatives), Poza Rica (ethylene, polythene and sulphur), Minatitlán (aromatic), Salamanca (ammonia and sulphur) and Cactus (sulphur). The Cangrejera was a petrochemical complex designed to take care of scale economies and it already counted on 12 finished



until 1996 and with which Mexico was placed in the fourth position amongst the world-wide petroleum producers. Thus, the south-east surpassed the Gold Strip (Faja de Oro) and the northeast as the main producing areas of Mexico.

Unfortunately, with the international collapse of the petroleum prices which initiated in 1981 and finally the prices collapsed in 1986, Mexico faced an extremely difficult stage for the industry which got worse, along with the internal economic situation.<sup>426</sup> In 1980 the export prices of the crude of type Istmo and Maya were of 19,2 and 16,5 dollars respectively, and for 1986, it had descended dramatically to 5,8 and 4,6 dollars.<sup>427</sup>

PEMEX decided to change its production policies from 1983, applying more restrictive and cautious plans with the purpose to obtain savings and to make more efficient its performance. On the other hand, a reduction of the shipments of crude to the outside was proposed. Despite the problems, PEMEX could cover almost the totality of the internal consumption.

Between 1987 and 1995 the PEMEX annual production of crude oscillated irregularly between the 927 and 955 million barrels and the exports of crude were placed respectively between 491 and 477 million barrels, with proportions with respect to the total production of 53% and 49%.<sup>428</sup>

PEMEX chose, as a strategy, the modernization of the refinement procedure which had as primary targets to process great amounts of heavy crude transforming it into light fuel, which has major added value, and to obtain fuel production with a smaller proportion of polluting agents.<sup>429</sup>

#### **3.6.7.1.4 The Petroleum Legal Reform – 1995.**

Until the year of 1995, *Petróleos Mexicanos*<sup>430</sup> (PEMEX), a public decentralized Agency of the Federal Government, was the only entity authorized to build, operate and be the owner

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plants. For 1983 all the infrastructure was connected by a network of pipelines of 42 thousand 213 kilometres, composed by: 52% gas pipelines, 28% pipelines, 13% multi-pipelines and 6% petrochemical pipelines. Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 128-130.

<sup>426</sup> This situation was based on the increase of the interest rates.

<sup>427</sup> Morales, Isidro et al. “La formación de la política petrolero en México 1970-1986”, el Colegio de México, 1988, pp. 153-155.

<sup>428</sup> Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, 2006, pp. 145.

<sup>429</sup> Oxygenated Gasoline elaborated for engine vehicles and the closing of the refinery of Azcapotzalco in order to improve the quality of the air of Mexico City.

<sup>430</sup> The 7 June 1938, months after the expropriation decree of 18 of March of the same year, it was created *Petróleos Mexicanos*, with ample faculties to carry out all the legal transactions that are required for the fulfilment of their aims: to conduct all the operations related to the oil industry like exploration, operation, refining and storage, as well as distribution and sale of petroleum and its derivatives pertaining to the Nation. On Friday 28 November 2008, the seven decrees are published in the Official Journal of the Federation that integrate the Energetic Reforms; with this the works headed by the Federal Government in this important initiative conclude to fortify to the most important company of the country.

of gas pipelines in Mexico, with capacity to import, export and commercialize natural gas into the national territory.

In order to bring the legal framework and the industry situation update, with the purpose to boost the optimization of a natural gas policy, considering an abundant, clean, economical, efficient and safe combustible, in 1995 the Mexican Government set out the convenience to carry out a structural legal reform in this industry in order to expand the pipeline infrastructure and to bring about a greater economic development in the country.<sup>431</sup>

Therefore, they opened to the private participation the activities of storage, transportation and distribution of natural gas thru pipelines that were reserved, in the past, only to the State via PEMEX, as well as the activities of foreign affairs and the commercialization of this combustible in national territory.

That year, it was reformed the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry<sup>432</sup> (Second Constitutional Level Law), it was issued the Secondary Law of Natural Gas (RGN)<sup>433</sup> and the conformation of a new legal frame work was initiated. The new legal frame covered: the issuance of the Law of the Regulatory Energy Commission (Law of the CRE)<sup>434</sup> in October 1995, as well as the later issuance of Directives and Official Mexican Standards, establishing the general guidelines of the regulatory frame of the natural gas industry, that gave legal certainty to the investors interested in participating in such a sector.

#### **3.6.7.1.5 The Highest PEMEX' Production.**

In 1996, PEMEX obtained a production of crude of 1,043 million barrels, being considered that year as “the highest volume in the history of PEMEX”. Of this amount 74,6% corresponded to the marine regions of the south-east and northeast. The amount of the production was composed by 52% of light and super-light crude and the rest of heavy crude. The following year, in 1997, it produced 4,5 million cubical natural gas feet, number that surpassed the maximum level reached in 1982 of 4,2 million cubical feet. Most of the natural gas production was obtained in the South region, Chiapas-Tabasco.<sup>435</sup> The annual crude production increased year with year, until reaching in 2005 the number of 1,237 million barrels, standing out the fields of the Cantarell complex.<sup>436</sup> With the increase of the production the export sales were reactivated. The refinement did not undergo great changes because the six refineries<sup>437</sup> of the company maintained a constant rate that

<sup>431</sup> The legal framework can be consulted at, “Marco Jurídico Básico 1997”, Petróleos Mexicanos, 6th. Edition, Mexico, 1997.

<sup>432</sup> In Spanish: “Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo”.

<sup>433</sup> In Spanish: “Reglamento de Gas Natural”.

<sup>434</sup> In Spanish: “Ley de la Comisión Reguladora de Energía”

<sup>435</sup> PEMEX, Memoria de Labores, 1993, 1996; PEMEX, Anuario Estadístico, 2005.

<sup>436</sup> Between 2000 and 2004 the contributions of Cantarell in the PEP production were increased from 47% to more than 61%.

<sup>437</sup> The refineries are: Cadereyta, Ciudad Madero, Minatitlán, Salamanca, Salina Cruz y Tula.

oscillated between 1,4 and 1,3 million daily barrels, as much in the processing of crude as in the petroliferous product elaboration.<sup>438</sup>

### 3.6.7.1.6 The Petroleum Legal Reform – 2008.

For our purposes and practical effects, considering the permanent and renewable resources within a unique category, we must recognize that Mexico is a rich energy country, in the sense that it has enough energy resources, both renewable and non renewable, the use of which, to this point, has determined, to some extent, our economic development degree and the advances in our social atmosphere.

On 28 November 2008, after nearly eight months that the President of Mexico, Mr. Felipe Calderón Hinojosa, sent to the Senate of the Republic several modification proposals for the energy sector<sup>439</sup> aimed to increase the national economic development, a legal reform was published on the Federal Official Journal. The proposals aimed to face the new challenges in the Oil and Gas national industry, in regards to the exploration and exploitation of the Oil and Gas resources, LP Gas, transportation, storage and distribution and refining. Such a reform, approved by the Mexican Congress, covers, in a general way, the issuance or reform of different legal documents, as mentioned below:

- (i) Decree that issues the Law of *Petróleos Mexicanos*;<sup>440</sup>
- (ii) Decree that reforms and implements several provisions of the Regulatory Law of Article 27 Constitutional in the Petroleum Industry.<sup>441</sup>
- (iii) Decree that reforms and implements Article 33 of the Organic Law of the Federal Public Administration.<sup>442</sup>
- (iv) Decree that issues the Law of the Hydrocarbons National Commission.<sup>443</sup>
- (v) Decree that reforms, implements and derogates several provisions of the Law of the Regulatory Energy Commission.<sup>444</sup>
- (vi) Decree that issues the Law for the Sustainable Use of Energy.<sup>445</sup>

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<sup>438</sup> Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, 2006, pp. 159.

<sup>439</sup> Reforms and Implementations to the Regulatory Law of Article 27 Constitutional in the area of Petroleum; Reforms to the Organic Law of Public Federal Administration; the Organic Law of *Petróleos Mexicanos* and Subsidiary Agencies; Reforms of the Law of the Regulatory Federal Commission, and the Law of the Petroleum Commission.

<sup>440</sup> In Spanish: “Ley de *Petróleos Mexicanos*”.

<sup>441</sup> In Spanish: “Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo”.

<sup>442</sup> In Spanish: “Ley Orgánica de la Administración Pública Federal”.

<sup>443</sup> In Spanish: “Ley de la Comisión Nacional de Hidrocarburos”.

<sup>444</sup> In Spanish: “Ley de la Comisión Reguladora de Energía”.

- (vii) Decree that issues the Law for the Use of Renewable Energies and the Energy Transition Financing.<sup>446</sup>
- (viii) Decree that implements Article 3 of the Federal Law of State-owned Entities<sup>447</sup> and Article 1 of the Law of Public Works and Related Services<sup>448</sup> and the third paragraph of Article 1 of the Law of Acquisitions, Rents and Services of the Public Sector<sup>449</sup>.

Due to the high importance of this petroleum reform for the development of the energy sector in Mexico, its fundamental essence is next commented as well as the transcendence that shall have during the next years in order to reach a bigger economic growth in Mexico.

The petroleum reform approved by the Congress of the Union is, without any doubt, a step forward that shall allow to face the new challenges of the national oil and gas industry, as for the exploration and exploitation of oil and gas resources, natural gas, gas LP, transportation, storage and distribution and refining and, in consequence, to improve the economic development for Mexico.

The premises that have oriented the successful reform are: the Nation has the property and domain of the resource; in this matter shall not be neither concession nor contracts that violate the constitutional mandate; the use and the exploitation of the resource corresponds only to the Nation, and the State keeps the property and the control over *Petróleos Mexicanos*, a public non-centralized body of the public federal administration.

We identify as the core part of the reform that *Petróleos Mexicanos* shall be strengthened by having a greater management autonomy, transparency in its administration, a better use of its technological resources and shall broaden its operative capacity, in the sense that it will be considered as a public agency with real possibilities to compete with similar worldwide recognized companies. Of parallel way, the attributions of the regulating organs are reinforced and new structures are created or are updated and modified the existing ones, either in gas, petroliferous, basic petrochemical, saving or efficient use of the energy. In addition, the reform included a revision of the energetic traditional policy, to incorporate new programs, strategies, action and projects, that shall be to allow the modernization of this sector.

The obtained advance is commendable but we considered that it is not sufficient. The time and the implantation of the approved reform, shall mark rules to redefine strategies and

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<sup>445</sup> In Spanish: “Ley para el Aprovechamiento Sustentable de la Energía”.

<sup>446</sup> In Spanish: “Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética”.

<sup>447</sup> In Spanish: “Ley Federal de Entidades Paraestatales”.

<sup>448</sup> In Spanish: “Ley de Obras Públicas y Servicios Relacionados con las Mismas”.

<sup>449</sup> In Spanish: “Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público”.

policies and to raise new reforms and additions, congruent with the requirements that the country requires to be around the development of the energy in the majority of the countries of the orb.<sup>450</sup>

### 3.7 Legal Culture.

#### 3.7.1 Concept.

Culture expresses the set of mental or spiritual elements that constitute the human content of a society; habits, law, art and economy are included within such a denomination. Culture is all that is not nature, which comes from the free creative of the human being. Then, all cultural phenomenon is a form of communication amongst humans, a language expression. Law is culture and language. Law has become the universal mechanism of communication.<sup>451</sup> Zariski considers that the concept of culture is ill defined and has been used in numerous disciplines to describe phenomena ranging in scale from international to familiar.<sup>452</sup>

According to Valentina Sara Vadi, three different meanings of culture can be identified: (i) culture in its material sense, as the product of a given culture process; (ii) culture in its immaterial sense, as a process of artistic or scientific creation; (iii) culture in its anthropological sense, that is, culture as a way of life.<sup>453</sup>

According to Horacio Grigera Naón, “culture” may be characterized as a complex of typical behaviour and standardized social forms peculiar to a specific social group. One could also describe it as an atmosphere of social beliefs, preferences, expectations and principles common to or shared by a specific social group.

As commented by Vincenzo Ferrari, “it is impossible to find historical examples of a society in which it does not exist a figure of collective or individual decision in charge of resolving problems that participate in the social coexistence and serve as inspiration of norms, written or not written, socially consolidated, on the base than it can be defined as “legal culture” of certain society”.<sup>454</sup> In other words, society and decision making have been always “hand-to-hand” and both have experienced a parallel evolution. However,

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<sup>450</sup> To know further information on the Mexican Oil & Gas industry, it can be consulted the following books: (i) Celis Salgado, Lourdes, “La industria Petrolera en México. Una Crónica I: de los Inicios a la Expropiación, Petróleos Mexicanos, México, 1988; (ii) “La Industria Petrolera en México. Una Crónica”, Tomo II, Naufal, Víctor M., “Gestión y Consolidación de Petróleos Mexicanos”, 50 Aniversario, PEMEX, México 1988; (iii) “La Industria Petrolera en México. Una Crónica”, Tomo III, Alvarez, Arturo, “Crisis del Crecimiento y Expansión de Petróleos Mexicanos”, 50 Aniversario, PEMEX, México, 1988.

<sup>451</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 179.

<sup>452</sup> Zariski, Archie, “Disputing Culture: Lawyers and ADR”, E Law, Murdoch University Electronic Journal of Law.

<sup>453</sup> Vadi, Valentina Sara, “Socio-Legal Perspectives on the Adjudication of Cultural Diversity Disputes in International Economic Law”, Oñati Socio-Legal Series, V. 1, n. 4 (2011), Oñati International Institute for the Sociology of Law, Instituto Internacional de Sociología Jurídica de Oñati.

<sup>454</sup> Ferrari, Vincenzo, Op.cit. footnote No. 128, pp.109.

such an evolution race has been headed sometimes by society and sometimes by decision making processes. It means, from our point of view, one has been adapted by the other in different levels, and the factor which makes those race participants to be in a competitive position is precisely legal culture.

David Nelken thinks that legal culture “is one way of describing relatively stable patterns of legally oriented social behaviour and attitude. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges (arbitrators, mediators) are appointed and controlled, to various forms of behaviours, such as litigation (arbitration, mediation)<sup>455</sup>, or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do”.<sup>456</sup>

### 3.7.2 ADR Legal Culture.

In the opinion of Mr. Grigera Naón, one can speak of an “arbitration culture” to the extent that those who resort to arbitration, either as parties or as counsels<sup>457</sup>, and those who participate in the conduct of arbitral proceedings and the decision of arbitral disputes (namely arbitrators and arbitral institutions) share certain ideas and expectations. These ideas and expectations relate to such matters as the role played by arbitral adjudication, the type of procedural and substantive justice to be obtained in the course or as a result of arbitral proceedings and the degree of effectiveness or binding force of arbitral determinations or awards. Such combination of common ideas, expectations and correlative patterns of conduct may well be designed as arbitration culture.<sup>458</sup>

In other words, arbitration should manage the different civilized manners of parties coming from different legal cultures and the outcome of the proceedings should be the same whether conducted in a civil or common law court. However, there are sometimes some problems in arbitration proceedings involving parties from different countries.<sup>459</sup> This does not mean, as considered by Dr. Christian Borris, that in an international dispute the choice of forum is irrelevant. As explained before, the arbitration law of the forum will be applied

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<sup>455</sup> That in parenthesis was added.

<sup>456</sup> Nelken, David, “Using the Concept of Legal Culture”, Australian Journal of Legal Philosophy, 2004.

<sup>457</sup> As an example we have the way in which lawyers are paid, which may condition their performance and how aggressively (or not) they conduct the arbitration proceeding. Where, due to ethical reasons and in order to allow access of the poor to justice, payment is based on the so-called contingency fee, an aggressive feeling is created. This probably does not exist in lawyers from countries where the so-called *de quota litis* pact is considered by law to be ethically unacceptable: a lawyer’s participation in the results of a process – or the payment of his services related to those results – creates a more or less litigious society. Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 150-151.

<sup>458</sup> Grigera Naón, Horacio, Op.cit. footnote No. 286, pp. 117.

<sup>459</sup> Attempts have been made to develop some sort of guidelines for handling the procedural problems, mainly in arbitration, as the promulgation of the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, in 1983, by the International Bar Association. See these Rules at: [http://www.united-adr.com/rules/IBA\\_supplemental.pdf](http://www.united-adr.com/rules/IBA_supplemental.pdf). Another example are the Notes on Organizing Arbitral Proceedings, published in 1996 by the UNCITRAL.



to all those proceedings where that city is chosen as the venue of the arbitration. The procedural rules applicable in national courts are normally designed to settle domestic disputes. For these reasons a party is almost always at a natural disadvantage in proceedings before a national court of another jurisdiction.<sup>460</sup>

### 3.7.3 Regional ADR Legal Culture.

ADR have the common ground of being used in every corner of the planet, in some for longer time than in others. Nevertheless, not in all the places have had the same success and acceptance, which, from our point of view, it has depended on diverse factors, either legal, social, economic or even religious.<sup>461</sup> We share the opinion of Mr. Bernardo Cremades, who thinks that arbitration is today the victim of its own success,<sup>462</sup> although, we think that such affirmation, in different measure of course, is applied differently in different parts of the world.

Some other authors, as Dr. Christian Borris, think that there are different philosophies around the world on this respect, that there are countries that easily accept the use of ADR<sup>463</sup> and there are others that are simply not prepared to consider them. Of course, these countries will have to live the peculiarities of the foreign court's rules, when making business abroad.<sup>464</sup>

Zariski, who performed an analysis of ADR culture, agrees that there is a change in lawyer's thinking about ADR. Most lawyers favourably disposed towards alternative dispute resolution practices. Yet, other studies indicate that the majority of them do not voluntarily choose these alternatives when they are offered.<sup>465</sup> We will show, in chapter V that the situation in Mexico is pretty close to Zariski's opinion.

#### 3.7.3.1 Europe.

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<sup>460</sup> Borris, Christian Dr., "The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process"; "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 1 - 2.

<sup>461</sup> The question whether arbitration is a true clash of legal cultures, was the question which led the members of the International Council for Commercial Arbitration to call the 1996 Seoul Conference, in order to discuss amongst professionals, from very different countries and cultural areas and in a country unfamiliar to many, the true cultural essence which underlines the practice of international commercial arbitration.

<sup>462</sup> One of the reasons of this statement is that dossiers presented to arbitral tribunal have enormously increased in volume, due to both the possibility of photocopied documents and the simplified drafting of submissions and statements through the use of sophisticated word processing programs. Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 148.

<sup>463</sup> Amongst the reasons why countries accept ADR are: (i) the believe that submission to the jurisdiction of a national court in the country where the other party is located would give that other party an advantage; (ii) the fact that parties can select arbitrators or mediators; (iii) confidentiality of the proceeding; (iv) speediness in the procedure and the fact that it is almost always less costly; (v) the procedural discretion that national or institutional rules generally grant to the arbitral tribunal; (vi) flexibility of the procedure.

<sup>464</sup> Borris, Christian Dr., Op.cit. footnote No. 460, pp. 2.

<sup>465</sup> Zariski, Archie, Op.cit. footnote No. 452.

It can be distinguished between the manner in which the practice of law is conducted on either side of the English Channel. Anglo-Saxon lawyers educated in the common law system have left their imprint, seeking to conduct arbitration proceedings in the same manner as judicial proceedings are conducted before domestic courts. England is known as the mother of commercial arbitration. London arbitration traditionally dealt with disputes arising in connection with a standard form of contract subject to English law, regardless of whether the transaction was domestic or international. In continental Europe, the approach to the resolution of conflicts differs between areas with Germanic cultural roots and those which we may call Latin zone of cultural influence.<sup>466</sup> In France the rules were originally against arbitration in domestic matters except those related to commerce.<sup>467</sup>

### 3.7.3.2 Asia.

East Asian, Arabic and Islamic societies are known for their emphasis on conciliation.<sup>468</sup> Neil Vidmar considers that it has been theorized that disputants from some Asian cultures prefer mediation over adjudication or arbitration, some social research tends to bear this out. However, other research suggests that, even in these cultures, when the parties do not have strong social ties and when a perceived injury is severe, they will opt for adjudication.<sup>469</sup>

Both arbitration and mediation are very strong in Asia, from Japan<sup>470</sup> to South Asia, existing in Singapore, Malaysia and Thailand great centres of arbitration. However mediation, as commented by Wong Yan, has been in use in Hong Kong for some time, but its application is still relatively narrow.<sup>471</sup>

Asia has been a leader in the promotion of ADR. The development and promotion of ADR has been the object of different international forums, being the APEC<sup>472</sup> one of the most

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<sup>466</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 149.

<sup>467</sup> Lazareff, Serge, "International Arbitration: Towards a Common Procedural Approach"; "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 32.

<sup>468</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 150.

<sup>469</sup> Vidmar, Neil, "Procedural Justice and Alternative Dispute Resolution", in Röhl, F. Klaus and Machura, Stefan, "Procedural Justice", a series published for the Oñati International Institute for the Sociology of Law, Oñati International Series in Law and Society.

<sup>470</sup> For further information on ADR in Japan see, Kondo, Masaaki, "Arbitration Law of Japan", Shojimohu, Japan 2004.

<sup>471</sup> Yan, Wong, "The Use and Development of Mediation In Hong Kong, Asian Dispute Review, Hong Kong International Arbitration Centre, April 2008.

<sup>472</sup> APEC is an intergovernmental forum in which the most important and dynamic economies of the Pacific region participate, being Mexico, Peru and Chili the Latin-American representatives. This intergovernmental forum counts with three pillars which support, in a global way, its own activities, which are: (i) the liberalization of commerce and investments; (ii) the facilitation of both, and; (iii) the economic and technical cooperation. APEC is formed, among other bodies, by a Secretariat and 10 Working Groups. Among the Working Groups, it is found the Human Resources Development Working Group (HRD-WG), integrated by 3 subgroups, being one of them the Capacity Building (CBN). One of the topics of the activities of this last

significant. This task, has been concretized by the recent “APEC ADR EEP 2000” (Asia Pacific Economic Cooperation – Alternative Dispute Resolution – Executive Education Project) in which we had the opportunity to be the representative of Mexico.<sup>473</sup>

We consider important to mention this project since its target was business people and their professional advisers, which represents, with no doubt, an important step in the big promotional task of such an advisable method to resolve disputes. In countries like Mexico, and in general in Latin-America, these activities had been habitually focused only on the legal sphere. Now, It has been considered necessary for the companies decision makers to know, in a general way, the advantages of ADR, as well as the way they work, to be able to ask their legal advisers to consider these alternatives or, inclusive, to ask them to use these methods in lieu of the traditionally known, which represents, in many cases, big economical losses for the companies.

### 3.7.3.3 Latin American.

Mr. Grigera Naón, who is a well recognized Latin American Lawyer in the international ARD world, considers that recent efforts in Latin America (mainly Mexico<sup>474</sup>, Peru<sup>475</sup>, Brazil<sup>476</sup>, Venezuela<sup>477</sup>, Colombia<sup>478</sup> and Argentina<sup>479</sup>) have created a more user-friendly environment in respect of international commercial arbitration.<sup>480</sup> Latin American countries have shifted from a cultural traditionally adverse to international commercial arbitration to one that regards this method of dispute resolution as an important tool for permitting the administration of a type of justice adapted to the needs of international commercial or economic disputes with the ultimate purpose of fostering economic development and investment in the region.<sup>481</sup> Such a cultural shift does not mean that Latin

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subgroup, in order to contribute with the APEC objectives, has been the Executive Education and Development, from which bosom the “APEC ADR EEP 2000” was created. It is important to highlight that the situation of the Project in this APEC organic structure, does not affect the importance of it, since APEC created the Project due to the preoccupation it has for the facilitation of the international business, which is, definitely, one of the main objectives in this intergovernmental forum.

<sup>473</sup> The “APEC ADR EEP 2000” is an official international project with the objectives of: (i) raising awareness about ADR; (ii) enhancing skills of business people and their professional adviser in negotiation and dispute resolution; (iii) promoting the use of ADR methods for commercial dispute resolution. The project will achieve these objectives by holding workshops, seminars, and the drafting of relevant material to be used in the diverse economies of the APEC.

<sup>474</sup> See *infra* pp. 200.

<sup>475</sup> Ley General de Arbitraje No. 26572, 5 January 1996.

<sup>476</sup> Nova Lei Brasileira de Arbitragem, 23 September 1996.

<sup>477</sup> Código de Procedimiento Civil de Venezuela, Gaceta Oficial de la República de Venezuela, No. 4196, Extraordinario of 2 August 1990.

<sup>478</sup> Estatutos de los Mecanismos Alternativos de Solución de Conflictos, 07 September 1998.

<sup>479</sup> Código Procesal Civil y Comercial.

<sup>480</sup> To some extent, this has been possible thanks to two important aspects: (i) a legal aspect consisting on the change of domestic ADR (mainly arbitration) legislation as well as the adoption of international treaties on this matter, and; (ii) an educational aspect consisting of a new generation’s education exposed to foreign ideas, often the result of travelling, studying abroad and the opening of telecommunications as well as the knowledge of foreign languages.

<sup>481</sup> Grigera Naón, Horacio, *Op.cit.* footnote No. 286, pp. 121.

American countries are adopting a new arbitration culture characteristic of Latin America. On the contrary, Latin America is incorporating what is increasingly the predominant world-wide arbitration culture, which has certain basic features common to jurisdictions in all continents, from the US, England and France to Singapore, Hong Kong and Australia.<sup>482</sup>

In the same direction is the opinion of Doak Bishop, an expert in Oil & Gas arbitration, who considers that the traditional hostility of Latin America countries towards international arbitration has changed dramatically in the past twenty years or so. Several Latin American countries have amended their domestic legislation to facilitate the commercial arbitration process, providing for the enforceability of an arbitration clause, the use of a foreigner as arbitrator and, in general, creating a more hospitable climate to the process of international commercial arbitration.<sup>483</sup>

Mr. Grigera Naón believes that Latin American parties seek international commercial arbitration, not in order to evade prohibitions that exist under a particular national law, but because of its neutrality in respect of any particular national legal system and its detachment from local or national bias.<sup>484</sup>

Nevertheless, the attitude of the governments and judiciary in Latin America has not always been so positive. There have been some objections to the recognition of ADR in respect of vital economic matters affecting national sovereignty, such as natural resources (Oil & Gas heading the list) and the stagnation of the local economies, and hence cross-border commercial exchanges. Specifically the first case, it means, the protectionism in the Oil & Gas sector will be further discussed.<sup>485</sup>

Other major development evidencing the change of Latin American culture regarding international commercial ADR is the general abandoning of positions close to the Calvo Doctrine.<sup>486</sup> This has been done by the elimination of the restrictions that prevented the parties from agreeing on arbitration abroad in the case of international transactions or which hindered the arbitrability of certain disputes, such as, natural resources.

The acceptance of arbitration in Latin American countries is evidenced by a general ratification of international conventions and a modernization of the existing arbitration

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<sup>482</sup> Grigera Naón, Horacio, *idem.*, pp. 132.

<sup>483</sup> Bishop, Doak R., Entri, James E., "International Commercial Arbitration in South America", *The United States' Perspective Toward International Arbitration with Latin American Parties*, 8 Int'l L. Practicum 63 (Autumn 1995), published by the New York State Bar Association, New York.

<sup>484</sup> Grigera Naón, Horacio, *Op.cit.* footnote No. 286, pp. 131.

<sup>485</sup> See the characteristics of the PEMEX arbitrations in *infra* pp. 270.

<sup>486</sup> The Calvo Doctrine is a foreign policy doctrine which holds that jurisdiction in international investment disputes lies with the country in which the investment is located. The Calvo Doctrine thus proposed to prohibit diplomatic protection or (armed) intervention before local resources were exhausted. An investor, under this doctrine, has no recourse but to use the local courts, rather than those of their home country. As a policy prescription, Calvo Doctrine is an expression a legal nationalism. The principle, named after Carlos Calvo, an Argentine jurist, has been applied throughout Latin America and other areas of the world.

laws.<sup>487</sup> The evolution, however, of national laws and court decisions towards standards more adapted to the needs of international ADR is still in progress in Latin America.

Professor Tang Houzhi's opinion is that as in the Far East and in Latin America the philosophy of conciliation and the idea of combining arbitration with conciliation is popular in spite of the fact that arbitration is not yet well developed in practice.<sup>488</sup>

### 3.7.4 ADR Legal Culture Main Differences.

There are some aspects where the cultural differences between jurists from different backgrounds truly appear and the resulting outcome can be a proper "omelette" vs. a "salad" as named by Andreas Lowenfeld.<sup>489</sup> These aspects go from very basic and insignificant stages in the procedure until essential and transcendental stages of the proceeding. Mr. Bernardo Cremades<sup>490</sup> and Dr. Christian Borris<sup>491</sup> summarize well such aspects.

#### 3.7.4.1 Communications.

The first of these aspects is the effective communication between the arbitrators and the parties on matters of evidence. Evidence refers to proof, testimonies and documents which may legally be presented to prove or disprove a fact under inquiry. In an adversarial procedure such as arbitration the parties themselves are responsible for the adduction of evidence and the arbitrator should determine which issues and evidence are important and which are not. There is also an opportunity to rebut adverse evidence. There are four possible types of evidence: (i) direct<sup>492</sup>; (ii) circumstantial<sup>493</sup>; (iii) real<sup>494</sup>; and (iv) documentary<sup>495</sup>

<sup>487</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 167.

<sup>488</sup> Houzhi, Tang, Op.cit. footnote No. 72., pp. 107.

<sup>489</sup> Andreas Lowenfeld quotes that "in the 1970's I participated in a number of arbitrations in which the arbitrators, coming from different cultures and legal systems, had significant differences about the conduct of the arbitration. The outcome (in individual cases and in a group of cases over, say, a five-year period) was more like a salad than an omelette, with individual inputs depending on where the arbitrators and counsel came from, what they were used to in their court systems." We totally agree with such a classification, understanding that the omelette is the result where all the differences could be overcome and the salad where the differences were stronger than the ability of the arbitral tribunal and the parties. See Lowenfeld, Andreas F., "International Arbitration as Omelette: What Goes into the Mix"; "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 23.

<sup>490</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 158 - 168.

<sup>491</sup> Borris, Christian Dr., Op.cit. footnote No. 460, pp. 6 -18.

<sup>492</sup> Where evidence of facts is communicated directly to the court by someone who himself has perceived the fact to be proved.

<sup>493</sup> Where the evidence does not directly prove the desired facts, but the existence of proof of those facts can be inferred from it.

<sup>494</sup> Consisting of material objects other than documents, which are produced for inspection by the arbitral tribunal and which can be either immediate (directly available for perception by the tribunal) or reported (existence is reported by a witness).

<sup>495</sup> Which could be primary or secondary, depending on the source.

### 3.7.4.2 Discovery.

Discovery is a mechanism previous to trial, used in the Common Law System,<sup>496</sup> which can be used by one party to obtain data from the other party on the case, in order to attend the preparation of the trial. In other words, this process allows each party to discover evidence which is not available to it. According to the Civil Procedure Federal Rules of the United States of America, the instruments used in this mechanism can be: declarations in oral or written questions, written interrogations, production of documents and things, permission to enter properties, physical and mental examinations and request of admission. The term “discovery” is generally referred to the revelation of facts of the defendant, public deeds, documents or other things that are under their exclusive knowledge or possession and whose revelation is necessary as part of the cause of the pending action, or to be taken to another court, or as evidence of his right or title in this process.<sup>497</sup>

Discovery constitutes the true cornerstone in the Anglo-Saxon legal process where even clear differences exist between jurisdictions. This is one of the most difficult matters to handle when one has to chair an arbitral tribunal between a North American party and another from a Latin American country.<sup>498</sup> While, to the North American jurist, it seems quite obvious that the other party must reproduce as many documents as may be related to the case under question, the Latin American jurist reacts by presenting exclusively those which may benefit him, feeling legitimately proud of retaining those which in one way or another, may harm him.<sup>499</sup>

Under many modern arbitration statutes, the arbitral tribunal is given the discretion to order discovery measures, but is not obliged to do so.<sup>500</sup> We share the idea of Dr. Christian Borris

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<sup>496</sup> In the Common Law tradition, pre-trial discovery is regarded as one of the most important means of ascertaining the truth.

<sup>497</sup> See the definition contained in the case: *Hardenbergh v. Both*, 247 Iowa 153, 73 N.W.2d 103, 106

<sup>498</sup> Dr. Christian Borris believes that the civil law jurisdictions are not familiar with this process. The right one party has to request the production of documents in possession of another party is very limited. Such rights are usually regarded as existing under substantive law rather than procedural rules. It is generally vigorously rejected by many lawyers in civil law countries, mainly for the reason that these procedures create the risk of an inappropriate invasion of privacy and “fishing expeditions”. He considers that discovery seems to be important in a system in which there is a strict separation of the oral trial and the proceedings which precede it, as it is the case under the common law. In contrast, in the civil law system, the facts and evidence are presented by the parties more gradually in the written pleadings leading to the oral hearing (it is the interest of both parties to submit all relevant evidence as early as possible). Discovery orders may be difficult or impossible to enforce in many civil law jurisdictions. Although in principle, the Hague Convention of 18 March 1970 on Taking of Evidence Abroad in Civil or Commercial Matters does not exclude judicial assistance with respect to pre-trial discovery measures, even in arbitral proceedings. Borris, Christian Dr., *Op.cit.* footnote No. 460, pp. 10.

<sup>499</sup> See a list of arbitration cases on discovery issues at: Cremades, M. Bernardo, *Op.cit.* footnote No. 71, pp. 158 – 160.

<sup>500</sup> The option existing under the old English Arbitration Act 1950 to request a discovery order from the High Court has been abandoned. Moreover, an application to annul an arbitral discovery has, on occasion, been refused by the English High Court. See “*The Anangel Peace Case*” (1981), 1 *Lloyd’s Rep.* 452, 454. Borris, Christian Dr., *Op.cit.* footnote No. 460, pp. 11.



in the sense that discovery should not be categorically rejected in international commercial arbitrations, as long as, both parties agree to cooperate in the discovery process, if there is not a previous agreement, discovery should only be ordered in restricted circumstances. If we are in the presence of a Latin American party, the arbitral tribunal should be careful in drawing negative conclusions from such party's refusal to produce documents.<sup>501</sup> Americans sue first, then rummage through their opponent's files to build their cases, while Latin Americans know one another, and nearly always are both in possession of most of the relevant documents.

### **3.7.4.3 Hearings.**

It is clear that the Anglo-American tradition in favour of oral hearings is now firmly established in arbitral proceedings while the continental colleagues as well as Latin Americans prefers to give more importance and weight to every written and document stage of the proceedings.

### **3.7.4.4 Witnesses and Experts.**

The preparation of witnesses and experts with a view to their participation in hearings before the arbitral tribunal may equally reflect profound cultural and ethical differences between the parties in conflict. The normal practice is to prepare them for this process which may be shocking and even reproachable from the ethical and professional perspective of jurists from a different cultural background. The tribunal must thus know how to distinguish different cultural origins in the evaluation of their respective testimonies.

One first issue could be whether a party in a controversy can be a witness as well. The common law tradition generally accepts that a party may give evidence as a witness, while civil law jurisdictions generally do not accept it or at least only in exceptional cases.<sup>502</sup> The arbitral tribunal would normally not prevent a party from making any statements in the proceedings in support of its own case.

A second issue could be whether written statements are accepted as evidence. In civil law procedures they are generally not accepted, while in common law systems they are generally accepted and treated them as evidence, subject to each party's right to request cross-examination of a witness. Since written statements are prepared on the initiative and under the control of one party, their evidentiary value may sometimes be questionable, however, the arbitral tribunal should never refuse to examine a witness *in personam* if this is requested by one party, provided that the testimony of such a witness could be material. Written witness statement may be a useful instrument in arbitration.

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<sup>501</sup> Borris, Christian Dr., *idem.*, pp. 12 – 13.

<sup>502</sup> An example of this is when the managing directors of a limited liability company, who by statute are its representatives as a party, participate as a witness in a legal process. Borris, Christian Dr., *idem.*, pp. 15.

A third issue on regard to witness is the appointments of witness in a procedure. In common law procedures, expert witness are either appointed by the parties or, upon the application of either party, the court may appoint an independent expert. In contrast, in the civil law system, the independent expert is almost always appointed by the court. Although the parties are free to obtain the opinion of an expert and to produce his opinion in the proceedings, such opinion would be treated as the submission of a party rather than evidence. In practice, expert opinions are obtained and introduced into the proceedings by both the arbitral tribunal and the parties, depending on the circumstances of the case. The arbitral tribunal has complete discretion in weighing evidence.<sup>503</sup>

It is extremely rare in international arbitrations today for a witness not to submit an affidavit to the arbitral tribunal before the hearing, however, the meaning, assessment and value depends on the legal culture of the arbitrator. Common lawyers will tend to give credence to whatever is signed, particularly if it is sworn. Continental arbitrators, on the other hand, will tend to have little faith in a document which they assume was prepared by someone other than the signatory, that is, the lawyer. Will this mean that “the word of honour” is different in both systems? We would say, yes.

#### **3.7.4.5 Cross-Examination.**

Cross-examination is the practice of the examination of witnesses by both parties rather than the judge or the arbitrator and it has been believed to be the best method of testing the credibility of a witness. The normal procedure of cross-examination consists of the fact that the first party presenting the witness is entitled to ask questions of the witness (examination in-chief), followed by questions from the other party (cross-examination).<sup>504</sup>

The practice of cross-examination<sup>505</sup> is the balance established procedurally in some countries and may form the subject of legitimate preparation of witnesses and experts. In other legal systems, however, there is an undeniable allergy towards the aggressive nature of cross-examination. Even on this point there may be a mixture of different attitudes amongst the arbitrators composing the arbitral tribunal as the neutrality and independence of many of them contrast, in some cases, with the partiality and true “watchdog” function performed by others. One attitude or another shall condition the participation of arbitrators in the cross-examination of witnesses or experts.

The examination of witnesses in common law procedure takes normally considerably more time than under civil law, where witnesses are usually examined with respect to contentious issues. Moreover, witnesses are primarily examined by the judge and only thereafter by the

<sup>503</sup> Borris, Christian Dr., *idem.*, pp. 17.

<sup>504</sup> Borris, Christian Dr., *idem.*, pp. 13.

<sup>505</sup> According to Cremades, the purposes of cross-examination are: (i) to disclose known facts or admissions not related in direct testimony that may contribute independently to the favourable development of the case; (iii) to place facts in true perspective; (iv) to reconcile apparent contradictions and (v) to impeach the reliability and credibility of a witness. Most cross-examination are directed to this last purpose. Cremades, M. Bernardo, *Op.cit.* footnote No. 71, pp. 158 – 160.

parties' counsel. In international commercial arbitration both methods can be easily combined and the recommendation is to combine, indeed, both methods. A party should not be denied the opportunity of asking questions directly of a witness or expert. But it is not necessary in arbitration to stage witness examinations in the form of theatrical performances and the rehearsal of witness examination should thus be discouraged in arbitration.

### 3.7.4.6 Arbitration Venue.

Another advantage is the selection of the venue of the arbitration.<sup>506</sup> The choice of venue shows an element of neutrality, as it can be a different place of residence or business of the parties in dispute. For the choice of venue one has to take into account several factors such as: the geographic location and availability of space and services<sup>507</sup>, as well as the amount of the dispute and the cost of the arbitration.

From a legal and political standpoint, there are four success factors that are basic when selecting a venue<sup>508</sup>. These factors are: (i) to choose a country which has adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).<sup>509</sup> It would be, otherwise, impossible to obtain the international enforcement of arbitral awards, (ii) that the country has a modern arbitration legislation and adaptable enough to the rules chosen by the parties. This legislation will have a supplementary role to the proceedings and to the jurisdiction of the court where the arbitration agreement might be void. Do not confuse with the jurisdiction of the court to execute the arbitral award, which shall be that of the territory where it is intended to carry out the execution<sup>510</sup>, (iii) the possibility of designating a place where there are assets of the parties, and (iv) to select a country that has a suitable environment for the normal conduct of the arbitration.<sup>511</sup>

<sup>506</sup> It is also known as the "place", "venue", "forum".

<sup>507</sup> Sigvard Jarvin mentions amongst these practical considerations, the availability of suitable hearing rooms, accommodations, secretariat assistance, communications and other infrastructure, the availability of foreign exchange, the freedom to transfer it, the time and cost of traveling. Jarvin, Sigvard, "Leading Arbitration Seats- A (mostly European) Comparative View", "Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends"; Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 40.

<sup>508</sup> As for the legal point of view more than the practical one, Mr. Jarvin considers that the followings are factors to be considered: the degree of judicial intervention in the arbitration process, the means of challenging an arbitrator, the freedom of choice of the law applicable to the merits, whether several arbitrations may be joined together into one single proceeding, whether discovery is possible, what conservatory measures are available, arbitrability of the subject matter of the dispute, admissibility of evidence, examination of witnesses, injunctions, attachments, technical expert, availability of law reports and law books on both *lex causae* and *lex fori*, etc. Jarvin, Sigvard, *idem.*, pp. 40.

<sup>509</sup> The award will be considered issued in that country.

<sup>510</sup> This legislation must comply with the formalities of the place. For example in Saudi Arabia arbitrators must be Muslim or female.

<sup>511</sup> Practice has shown that the parties deemed sufficiently important to choose the place of arbitration. In the year of 1987, 57% of arbitration clauses brought before the ICC provided expressly for the place where the procedure should be carried out. If the parties do not agree on the venue of the arbitration, the venue will be chosen, in an ad-hoc arbitration, by the arbitral tribunal, taking into consideration the parties' interests, and in

So, determination of the venue of arbitrations must not be easy, and has to be carefully decided, not considering the tourist attractions of the place nor its proximity to the arbitrator residences.<sup>512</sup> Nowadays, arbitration and mediation are in fashion almost in every corner of the globe, since Latin America<sup>513</sup> to Asia<sup>514</sup>, since North America<sup>515</sup> to Australia<sup>516</sup>, Since Europe<sup>517</sup> to Africa<sup>518</sup>. There are many countries that have brought their legislations up to date to accommodate international arbitrations whereas in other places legislation is old and development takes place through case law. Amongst these countries we find: England<sup>519</sup>, France<sup>520</sup>, Australia<sup>521</sup>, Switzerland<sup>522</sup>, Sweden<sup>523</sup>, Hong Kong<sup>524</sup>, China<sup>525</sup>, Singapore<sup>526</sup>, Malaysia<sup>527</sup>, USA<sup>528</sup> and Mexico<sup>529</sup>.

an institutional arbitration, by what is foreseen at the institutional rules. As for the peace and neutrality of the venue, there is a leading case of the year of 1986 in the Federal Court of the United States. The case was between an American company (Ashland Oil, Inc.) and Iran (National Iranian Oil Company). The parties agreed in their arbitration clause before the Iranian conflict, that the matter should be carry out in Iran. The United States Supreme Court declined the request of a party to move the arbitration venue provided in the arbitration agreement to the United States. This shows that it is impossible to unilaterally modify the arbitration agreement, even if the atmosphere of the place where the arbitration is intended to be brought, is the worst.

<sup>512</sup> The following questions, according Sigvard, must be made when fixing the place for arbitration in the contract: (i) active, managing arbitrators or not?; (ii) cross-examination of witnesses or not?; (iii) party or arbitrator appointed experts?; is effective assistance by the courts available at the place of arbitration?; (iv) are courts at the seat interventionist and is there a risk they will delay the proceedings?. Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 44.

<sup>513</sup> To know further on the development of arbitration in Latin-America, see Grigera Naón, Horacio, Op.cit. footnote No. 286, pp. 117 – 146.

<sup>514</sup> To know further on the development of arbitration in Asia, see Crook, Jonathon, “Leading Arbitration Seats in the Far East: A Comparative View”, “Conflicting Legal Cultures in Commercial Arbitration, Old Issues and New Trends”, Editors Stefan N. Frommel and Barry A.K. Rider; Klumer Law International; London, 1999, pp. 63 - 78.

<sup>515</sup> To know further on the development of arbitration in the USA, see Venkata Raman Rao, Ajjarapu, “Mediation, Conciliation and Arbitration, USA and India, a comparative study”.

<sup>516</sup> To know further on the development of arbitration in Australia, see Nottage, Luke and Garnett, Richard, “International Arbitration in Australia”, Edited by Luke Nottage and Richard Garnett, The Federation Press, Australia, 2012.

<sup>517</sup> To know further on the development of arbitration in Europe, see Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 39 - 61.

<sup>518</sup> To know further on the development of arbitration in Africa, see Asouzu, Amazu A., “International Commercial Arbitration and African States”, King's College London, Cambridge University Press, 2001.

<sup>519</sup> London has, with the 1996 English Arbitration Act, the most recent legislation of European cities. The regional arbitration center is the London Court of International Arbitration (LCIA).

<sup>520</sup> The French legislation dates from 1982 and is thus not based on the UNCITRAL Model Law. The French Code of Civil Procedure distinguishes between national and international arbitration. The parties have great freedom to shape the procedure and the procedure in international arbitration can be totally detached from French courts practice. However where the arbitrators are French-influenced they have tendency to appoint experts to resolve technical issues, as is the practice in French court proceedings. The case law is reported in *Revue de l'Arbitrage* and articles appear in *Revue de Droit des Affaires Internationales*. The regional arbitration center is the International Court of Arbitration of the International Chamber of Commerce (ICC).

<sup>521</sup> The legislation on arbitration is the Federal Code of Civil Procedure of 1895 which was updated in 1983. It is thus not modeled on the UNCITRAL Model Law. The parties enjoy great freedom to decide on the procedure as do the arbitrators. The regional arbitration center is the Australian Centre for International Commercial Arbitration (ACIC)

### 3.7.4.7 Judicial Assistance.

Judicial assistance is another aspect that should be considered, as it has been already mentioned, arbitrators have not faculty to enforce their decisions. Therefore they need the intervention of national judicial systems, which judges play a supervisory and supportive role during the arbitration proceedings. The assistance includes the following stages during the procedure: appointment of an arbitrator; determination of arbitrability; enforcement of arbitration agreements; stay of proceedings; enforcement of awards; assistance in taking evidence; the issuance of interim measures; amongst others.

### 3.7.4.8 Arbitrability.

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<sup>522</sup> The private International Law Statute of 1988 is a modern federal legislation adapted to international arbitration, which is not based on the UNCITRAL Model Law. The statute applies to arbitrations where one party has its seat outside Switzerland. Parties enjoy great freedom to organize and conduct the arbitration proceeding. Case law is reported in the Bulletin of the Swiss Arbitration Association. The regional arbitration center is the Swiss Arbitration Association or Association Suisse d'Arbitrage (ASA)

<sup>523</sup> The arbitration statute dates back to 1929. Although a new law modeled on the UNCITRAL Model Law, is in preparation. Development in Sweden has taken place largely through case law. Great freedom is given to the parties to agree on the arbitration procedure. Case law can be found in the Stockholm Arbitration Institute Yearbook. The regional arbitration center is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute).

<sup>524</sup> Arbitration law is set out in the Arbitration Ordinance, which was based on the English Arbitration Act of 1950 but amended in 1989 to adopt the provisions of the UNCITRAL Model Law for international arbitrations. A number of differences between the national and international regimes have been removed as a result of the Arbitration Amendment Ordinance of 1996. The parties to an international arbitration may wish to preserve the right of appeal on important questions of law, therefore, the Ordinance allows scope for this by providing that the parties may, by agreement, "opt in" to the domestic regime. The regional arbitration center is the Hong Kong International Arbitration Centre (HKIAC).

<sup>525</sup> The principal sources of arbitration law in China are the Arbitration Law of 1995 and the Civil Procedure Law of 1991. The regional arbitration center is the China International Economic and Trade Arbitration Commission (CIETAC) which has an effective Monopoly over the conduct of arbitrations in the PRC, since international arbitrations in the PRC under the rules of a foreign institution are in practice discouraged by the absence of any legal mechanism for the enforcement of awards other than those made by CIETAC.

<sup>526</sup> In 1994 Singapore enacted the international Arbitration Act, which adopts the UNCITRAL Model Law in respect of international commercial arbitration. Domestic arbitrations are still governed by the Arbitration Act, based on the English Arbitration Act of 1950. Singapore has become quite popular for maritime disputes. The current legislation foresees that where the issues in dispute involve Singaporean Law a Singaporean lawyer must be included in the arbitration team. There are no restrictions on who may act as arbitrator. The regional arbitration center is the Singapore International Arbitration Center (SIAC).

<sup>527</sup> The arbitration law is also based on English law. But the legislation has remained largely unamended since that time. Although Malaysia is a pro-arbitration jurisdiction, there is no specific statutory regime for the conduct of international arbitrations. The regional arbitration center is the Kuala Lumpur Regional Center of Arbitration.

<sup>528</sup> The Federal Arbitration Act, enacted in 1925, provides for contractually-based compulsory and binding arbitration, resulting in an arbitration award entered by an arbitrator or arbitration panel as opposed to a judgment entered by a court of law. The regional arbitration center is the American Arbitration Association (AAA).

<sup>529</sup> See *infra* pp. 200.

The concept of arbitrability relates to those limitations upon arbitration as a method of settling disputes. Each state may decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not.<sup>530</sup> Of utmost importance is to determine those subject matters that can be resolved using the recommended private arbitration mechanism. As for the public arbitration, for not being object of the present research work, shall not be covered. Arbitrability varies according to the laws of each country, because what can be considered arbitrable in one legislation could be listed as non-arbitrable in another<sup>531</sup>. Several factors may be involved in determining these subject matters, but primarily the legal traditions of each country and the protective effect of the state, in some parts of the world, is what has served as a regulatory framework.

As a general rule we can say that what belongs to public law is not arbitrable for the purposes of private arbitration. While each legislation should be known to determine what branches of law belong to the public sector and which to the private one, we can generalize by saying that the commercial law, civil law, and international commercial law belong to private law and the rest to the public.<sup>532</sup>

When a dispute involves public interest, as in the case of the commitment of a crime, we are clearly facing a non-arbitrable subject matter. Similarly, in the case of monopolies, consumer protection, environmental issues, price controls, licensing of antitrust. In some cases, commercial businesses are involved, and by no means, the subject matter is arbitrable. But on the other hand, many times the allegation of non-arbitrability may be made *mala fide* in order to delay the proceedings.<sup>533</sup>

Another way to determine the subject matter on which arbitration can be applied is as follows. Arbitration is only applicable to those rights where the parties can compromise themselves, since their interests are only affected and no harm can be caused to anyone but the parties. In other words, arbitration is a figure that can be used in commercial relationships where the parties are the “only” affected. The reason of this is the legal

<sup>530</sup> Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 137.

<sup>531</sup> According to Mexican civil law there are several limitations. In Commercial legislation no limitations are found since art. 1051 of the Commercial Code establishes that the preferred commercial procedure is the conventional one. According to Humberto Briseno, we found limitations in civil subject matters. The Civil Code of the Federal District provides for the possibility that the parties make a Settlement Agreement to resolve a current dispute or prevent a future one. Briseno also specifies the cases in which it is not possible to use arbitration, such as: the marital status of persons, the validity of marriage, but it will be likely to be used in financial entitlements. There is not possible the use of arbitration in future food determination, but it is, on the amounts already due. Beyond these direct terms, the law declared invalid the use of arbitration to determine: (i) crimes, willful misconduct, and future blames, (ii) the civil claim born of a crime, (iii) future estate, (iv) inheritance before seen the will, if any, and (v) on the right to food. See Art. 2950 of the Civil Code and Briseño Sierra, Humberto, Op.cit. footnote No. 117, p. 31.

<sup>532</sup> The Division of legal norms in the two major branches of private law and public law is the work of the Roman jurists. The classical doctrine is synthesized in the known ruling of the jurist Ulpian: “*Publicum jus est quod ad statum rei romanae spectat; privatum quod ad utilitatem singulorum.*” Public law is that concerning the conservation of the Roman thing; private, is the one concerning the utility of individuals. García Maynes Eduardo, “Introducción al Estudio del Derecho”, Editorial Porrúa, México, 1964, pp. 131.

<sup>533</sup> Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 47.



principle, universally recognized, of “those who can do more can do less”, it means, the parties have the free disposal of their rights even to go that far until their rejection.

Notwithstanding, sometimes, it is very difficult to determine with certainty which subject matters are and which are not arbitrable. In this regard, we find two solutions, the first that would consist of a list of arbitrable subject matters, or the second, on the contrary, a list of the exceptions to the general rule. For now, we must analyze each case to determine whether we are dealing with an issue subject to arbitration, although all that “negotiable or subject to compromise” is a good parameter to decide.

The two areas that can cause further confusion in legal systems where arbitrations can be developed are competition law and the issue of public policy. The general rule is that arbitration cannot be applied if either of those issues are involved. Competition laws are usually administered by the state or inter-state agencies in charge of monitoring the economic activities and which may be granted powers which are in essence the basis for penalties ordered by a court. The *Labinal* case answers the principal questions with respect to arbitrability over competition law issues under French law. The decision is as important as the *Mitsubishi*<sup>534</sup> case in the United States, and confirms that arbitrators have jurisdiction even if questions of public policy are involved. The *Labinal* decision was followed by another decision by the Paris Court of Appeal in *Aplix v. Velcro*.<sup>535</sup>

The same tendency has been explored for public policy, as Pierre Mayer mentions, just because a question concerns *ordre public* issues, this does not disqualify it from being arbitrable.<sup>536</sup> The content of public policy varies from one legal system to another. American courts have restricted this cause to foreign arbitration awards.<sup>537</sup> In England, as in other countries in Asia, the opinion of Donaldson MR is applied, who said that an arbitration award should not be denied execution on the ground of being against public policy. Except where there are elements of illegality or that the execution is clearly contrary the public wellness or, possibly, the enforcement is completely offensive to

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<sup>534</sup> The Supreme Court of the United States in the *Mitsubishi* case had no doubt that the Japanese arbitrators would apply United States antitrust legislation correctly. This case reversed a tradition of reserving this type of issue to the courts of the United States. *Mitsubishi Motors Corporation v. Soler Chrysler-Playmouth Inc.* 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d. 444 (1985). See a summary of the case at: Redfern, Alan and Hunter Martin, Op.cit. footnote No. 77, pp. 140.

<sup>535</sup> *Société Aplix c. Société Velcro*, Court d’Appel de Paris, 14 Octobre 1993, reported in (1994) *Revue de l’Arbitrage* 164, commented by Charles Jarrosson. This court textually repeated the general statement made by the same court in *Labinal*: that arbitrability is not excluded on the sole ground that rules having a public policy character apply to rights at dispute; in the international context the arbitrator decides his own jurisdiction with respect to the arbitrability of the dispute in light of international public policy; and that he has the power to apply the principles and rules that flow from it and sanction their non-observance, subject to the setting aside by the competent judge. Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 50.

<sup>536</sup> Mayer, Pierre, “Le Contrat Illicite” in (1984), *Revue de l’Arbitrage* at 206, Laurence Idot, (1989), *Revue de l’Arbitrage* at 299.

<sup>537</sup> *Parson and Whittemore Overseas Co. V Societe Generale De L’industrie du Papier* (1974) 508 F. 2d. 969 (2d. Cir).

ordinary reasoning and members of the public, on whose behalf it is exercised, the powers of state.<sup>538</sup>

There are two types of public policy: (i) national and internal and (ii) international. The New York Convention refers to international public policy rather than a national concept, because as already mentioned may vary from country to country. The international connotation refers to cases like genocide, slavery or that the subject matter is not arbitrable. In other words, public order is to give equal rights to the parties and not affect third's property who have no direct involvement in the arbitration.

There are two arbitration awards, one German and one Swiss that have been very important in this respect, stating that it is against international public policy when we are in the presence of any of these two principles: (i) The denial of the basic principles of justice; (ii) The breakdown of the domestic economy. While these principles are very abstract and subjective, they are a good parameter to determine the cause of non-recognition and enforceability of arbitration awards.

#### **3.7.4.9 State and State-Owned Company Parties.**

As considered by Sigvard Jarvin, the flexibility when choosing the arbitration venue is, in a way, reduced in contracts with powerful organizations, mostly state-owned, often in developing countries, such as PEMEX, which have had a strong bargaining position in their contract negotiations with a private firm. It is not unusual to find the place of arbitration fixed by contract in the country of the state organization. Mr. Jarvin continues considering that often, in cases where the local party has been the defendant, it has used all kinds of procedures and devices to stop the arbitration from going forward. These may include efforts to exercise influence on local and national authorities in order to obtain refusal by competent authorities to issue visas to the arbitrators or the opposing party's counsel, court litigation against the other party and injunctions against the arbitrator.<sup>539</sup> Fortunately, as far as we know, this is not the case of Mexico, nor PEMEX or any state-owned Mexican company.

Switzerland legislation is a role model to be followed on this matter, since it provides that if a party to the arbitration agreement is a state or an enterprise or an organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement. Swiss courts should no longer permit states to decline to arbitrate on the basis of their internal, legal prohibitions.<sup>540</sup>

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<sup>538</sup> Deutsche Schachtbau v Ras al-Khaiman National Oil Co. (1990) 1 AC 295.

<sup>539</sup> Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 41 - 42.

<sup>540</sup> See Article 177.2 of the PIL. A recent example illustrating this principle can be found in ICC Case No. 6162, Collection of ICC Arbitral Awards, 1991 – 1995, Arnaldez et. Al. (eds) (Kluwer Law International and ICC Publishing, S.A. at 75.

### 3.7.5 Overcoming the Differences.

It is important to mention that modern ADR law and practice (mainly arbitration) offers many instruments with which conflicts between legal cultures can be managed. Parties in international arbitrations are more frequently choosing arbitration as their preferred mean of settling disputes, because they feel that a truly international forum is more neutral than a national court. Arbitration offers all the flexibility, procedural techniques and instruments that are needed for this purpose. However, it is worth-mentioning the previously cited aspects in order to understand the direction that the arbitration flexibility should be addressed by the arbitral tribunal. ADR are handled by human beings and thus human errors are always expected, though not wished.<sup>541</sup>

The tendency arbitration has in overcoming this cultural differences are grouped up what can be known as *Arbitri Lex Mercatoria*. *Lex Mercatoria*<sup>542</sup> precepts have been reaffirmed in new international mercantile law. National trade barriers are torn down in order to induce commerce. The new commercial law is grounded on commercial practice directed at market efficiency and privacy. Dispute resolution has also evolved, and functional methods like international commercial arbitration is now available. The principles of the medieval Law Merchant (efficiency, party autonomy and choice of arbitrator) are applied, and arbitrators often render judgments based on customs. The new Law Merchant encompasses a huge body of international commercial law.<sup>543</sup>

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<sup>541</sup> To this respect, it is very interesting the declaration of Andreas F. Lowenfeld “I did have one losing counsel in a case where I was sole arbitrator, he called me to say “I think the result was wrong, you misinterpreted the contract, but you were always fair, you had a correct understanding of the parties’ legitimate needs, your rulings on evidence and discovery were sound, and neither I nor my client have any quarrel with the process”. Mr. Lowenfeld continuous stating “that kind of message makes an arbitrator feel good”. In another opposite experience, he quotes “I had another case where I presided over a three-person panel, in which the chairman of the losing party, a mid-sized American corporation in a dispute with its European distributor, sent me a long hand-written letter that started out “Arbitration sucks, and you, Professor, most of all....” Arbitrators can be good lawyers or professionals but always have to keep in mind those principles that prevent parties from having this feeling after the procedure. Lowenfeld, Andreas F., *Op.cit.* footnote No. 489, pp. 19.

<sup>542</sup> From the business development in the Middle Ages (X Century), they began to speak of a “*lex mercatoria*”, it means, a trade law that we nowadays know as international trade law composed by commercial usage and customs, sometimes collected in documents and in legal doctrine developed from the “*Corpus Juris*” by commentators, which became, with the support of merchants and others, a common applicable law in all kingdoms. Barrera Graf, Jorge, “*Tratado de Derecho Mercantil*”, México, 1957. For the development of international trade law, see Documentos Oficiales de la Asamblea General, decimonoveno período de sesiones, anexo No. 2, Documento A/5728, “Anuario de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional”, 1970, vol I, “Primera Parte. Reseña Histórica: la Creación de la Comisión de las Naciones Unidas para el Desarrollo Mercantil Internacional (CNUDMI)”. For further information on *Lex Mercatoria* and *Lex Petrolea*, see *supra* pp. 112 and 118.

<sup>543</sup> [http://en.wikipedia.org/wiki/Lex\\_mercatoria](http://en.wikipedia.org/wiki/Lex_mercatoria).

It has been questioned whether there is a kind of Lex Mercatoria for arbitration procedures. Andreas Lowenfeld thinks there is one<sup>544</sup>, and so do we. Though he does not like the term, we propose the term of “Arbitri Lex Mercatoria” or even “ADR Lex Mercatoria” which would consist of usages and customs applicable to arbitration and other ADR, as well as all the international documents that are applicable, either by law or by agreement of the parties, to such procedures. In this sense, it is important to emphasize the importance of the work that has had the UNCITRAL in international commercial arbitration, and that the rules developed by this institution and the work of the ICC are considered the cornerstone of this field, as well as the AAA International Rules. Despite not having the status of international conventions, these rules are optional as they aim to express the characteristics so typical of the Lex Mercatoria.<sup>545</sup>

As laid down by Serge Lazareff, the unification of procedural methods has become a subject *à la mode*. Indeed, the practitioner of international arbitration no longer accepts the basic distinction which prevailed only a few years ago: common law proceedings on the one hand, and civil law proceedings on the other hand.<sup>546</sup> The idea has been to combine the best elements of both legal systems.

The use of hearings and cross-examination has been a clear usage of the Anglo-American tradition when developing an ADR procedure. Cross examination has been considered as the best way to get at the truth and to resolve conflicts of evidence generally accepted in international arbitration. It is all right for arbitrators to ask questions when a point is not clear. Arbitrators often find that even when they have read all the documents and briefs beforehand, they cannot be as well prepared on the facts and issues as the counsel, who has an incentive to master the facts and who more frequently is supported by a team to help him/her do so. It has been said that it exists a trend moving international arbitration towards the Anglo-American model, mainly continental and Latin American counsels.<sup>547</sup>

Another important and very practical tendency is the acceptance of copy documents. In court proceedings the simple copy documents do not have the same assessment than the original ones. In ADR proceedings, on the contrary, and for practical reasons, copy documents are accepted unless the opponent party argues its non-authenticity.

Finally, discovery is another usage or custom belonging to the Anglo-American tradition that continental and Latin American counsellors have adopted. Some arbitrators are prepared to issue orders, so they have no bailiff to enforce them. Others prefer to indicate that failure of a party to comply with a reasonable document request will be against it, more generally in assessing the good faith of that party. Our opinion in that respect is that

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<sup>544</sup> Lowenfeld, Andreas F., Op.cit. footnote No. 489, pp. 23. See also A. Lowenfeld, “Lex Mercatoria: An Arbitrator’s View” in Thomas E. Carbonnewau (ed.) Lex Mercatoria and Arbitration, Ch. 3 (1990), also published in (1990) 6 Arbitration International 133.

<sup>545</sup> On 22 July 1993 it was amended the Mexican domestic arbitral law in the sense of adopting the text established by the Model Law.

<sup>546</sup> Lazareff, Serge, Op.cit. footnote No. 467, pp. 31.

<sup>547</sup> Lowenfeld, Andreas F., Op.cit. footnote No. 489, pp. 24 - 25.

arbitral proceedings in Mexico have been adapted to the mainstream the rest of the world has had as for the use of the discovery stage, as well as the use of copy of documents, the cross examination and the issuance of orders by the arbitrators although they do not have the power to enforce them. In other word, arbitrations in Mexico have followed the world-wide tendency of internationalization and deleting the barriers between the two main legal systems.

All these lead us to the unification or harmonization of ADR procedures, in which there are some interesting principles already known and accepted in all the countries where arbitration is successfully used. Amongst these principles we have the Kompetenz-Kompetenz principle<sup>548</sup> and the Arbitrability principle<sup>549</sup> as well as the ICC Terms of Reference,<sup>550</sup> and the concept of International Arbitration. However, according to the opinion of Serge Lazareff, complete uniformity is not desirable because flexibility is in fact an essential quality of international arbitration worth defending. Concluding this idea, we believe that it depends on the case, it means, to take it on a case by case basis to realize how harmonized and how ad-hoc to the case we want the procedure, since there will be cases where the luxury of discovery is justified and cases where only a short hearing should be held.

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<sup>548</sup> According to this principle the arbitral tribunal is the sole judge of its own jurisdiction.

<sup>549</sup> The Mitsubishi case is the leading case in this respect, in which the US Supreme Court decided that the arbitrators could hear anti-trust cases.

<sup>550</sup> This is the document in which the arbitrators set the framework of the dispute. This gives the national courts a yardstick for measuring whether the arbitral tribunal has remained within its jurisdiction. The Terms of Reference also leads quite frequently to settlements since it gives the parties a better understanding of their opponent's case at the outset.

## **CHAPTER IV**

### **The Case of Mexico – Legal Framework and PEMEX.**



*“Legislator is not who decides a Law, but who allows it”*  
*Thomas Hobbes*

#### **4.1 The Law and its Relationship with the Sociology of Law.**

As mentioned at the beginning of Chapter III of this work, the sociology of law is in charge of examining the law from the outside, extrinsically, in its integration into the social world. So well, everything that happens outside the letter of the law is of paramount importance, which would not be possible if there was no law. Consequently, we believe very important to know and have a very clear idea of, in this case, the legal framework of both, the Oil & Gas industry and the ADR industry in Mexico, since the phenomenon analyzed in this work is related to it.

As Max Weber considered, when one speaks of law, one should consider, particularly, the rigorous distinction between legal consideration and sociological consideration. Legal consideration is when we apply the concept of “should” to a verbal form that is presented as a legal norm, and, on the contrary, sociological consideration is what “in fact” happens in a community.<sup>551</sup>

No matter how we view the legal system, whether we describe it as a system of rules and decisions, as a set of institutions or repeated patterns of practices, we have to recognize its linguistic make-up. We have to take into consideration the law’s dependence on forms of communicative action, ie, law, its processes and institutions are produced and reproduced through written and spoken words.<sup>552</sup>

The norm, according to Vincenzo Ferrari, comes from the Latin “*norma*” which is an instrument or rule that measures and guides the human action. This rule after being institutionalized becomes a legal rule.<sup>553</sup> The norms are statements that usually have a hypothesis (the legal hypothesis) which once concretized by the individual (his/her action is adjusted to that provided in the text) the penalty or sanction prescribed by it, is triggered.

##### **4.1.1 Obedience of the Legal Norm.**

The law must be obeyed to achieve social peace. Vincenzo Ferrari mentions this law disobedience and that there are many motivations that make people to obey the law. He says that people obey for a substantive moral choice since the legal order is a more

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<sup>551</sup> Weber, Max, *Economía y Sociedad*, Fondo de Cultura Económica, México, 10ª. Reimpresión, 1993, pp.251 - 258.

<sup>552</sup> Banakar, Reza and Travers, Max, *Op.cit*, footnote No. 4, pp. 17.

<sup>553</sup> Ferrari, Vincenzo, *Op.cit*. footnote No. 128, pp. 37.

important asset than that of the chooser's opinion. Likewise, people obey due to a fear of a penalty foreseen at the rule of law, or since they are encouraged by the legal provision itself. They also obey because that foreseen in the rule comes from a legitimate authority.<sup>554</sup>

Similarly one can speak of a partial or global discrepancy of the law.<sup>555</sup> For example, we believe that the birth of the ADR had its origin in a discrepancy of law, a distrust of the administration of justice dispensed by the state courts.

#### **4.1.2 Measuring the Legal Norm.**

The norm or legal rule has been the subject of various studies, both from a purely legal point of view and from the socio-legal one. We believe that one of the most important studies is precisely the measurement of efficacy of the legal norms. A norm is effective when it is complied with. The efficacy is a feature that comes out when is put in relation to the social environment that is intended, so the efficacy is not a matter of legal theory, but of sociology of law.

Vincenzo Ferrari believes that the legal norm has a quantitative measure which can be translated into numbers.<sup>556</sup> The legal norm is complied with, when the ordinary recipients (citizens) do the required behaviour or when, not realizing the behaviour they are required, a body in charge of implementing the sanctions (judge) actually implements them. The first one can be called: first degree efficacy or compliance. The second one can be called: second degree efficacy or rule applicability. In short, citizens obey the rules and judges apply them.<sup>557</sup>

When all citizens obey the legal norms, one can speak of a maximum degree of efficacy, which is obviously very difficult to present. A relative degree of efficacy is when the legal norm is observed in some cases and in others not. When this latter is the case, the reaction of the legal staff, it means, the coercive sanctioning apparatus, may be full or partial as well.

#### **4.1.3 Sanction of the Legal Norm.**

Another very important element of the rule of law is the sanction. As Gregorio Robles says, it is commonly accepted amongst sociologists that what makes the difference between the legal norms to the regularities or patterns of behaviour is the fact that those come with sanctions. The issue of sanctions is sufficiently large for an independent research. For now, we just note that they can be positive or negative. The positive ones are those that

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<sup>554</sup> Ferrari, Vincenzo, *idem.*, pp. 175.

<sup>555</sup> Ferrari, Vincenzo, *idem.*, pp. 181.

<sup>556</sup> Ferrari, Vincenzo, *idem.*, pp. 37.

<sup>557</sup> Robles, Gregorio, *Op.cit.*, footnote No. 5, pp. 103.

reward the behaviour and the negative ones when is punished, although sociologists prefer to call them sanctions.<sup>558</sup>

The body which imposes the sanctions is the judge, sometimes assisted by the jury. Also, the arbitrators are people who are enabled, by common agreement of the parties, to implement the sanctions, if it is on arbitrable matters.<sup>559</sup>

Social sanctions or social uses have generally strengthened the legal punishment. Whoever violates the legal norm is not only sanctioned by the law but also by society. In modern society the social uses have lost force, but have been replaced by something even less controllable, the “public opinion”, which can act as a true judge not subject to other law than that of Lynch.<sup>560</sup>

#### 4.1.4 Uncertainty of the Legal Norm.

Another important aspect is the uncertainty of the legal norm. Often, we do not know exactly what our duties and our rights are, especially people that have nothing to do with the world of law. The uncertainty is derived from social ignorance of law and for the sociology it cannot be an inconsequential phenomenon. Knowledge can be partial or total.

This ignorance of law can be used by those who know it and want to manipulate those who do not know it. For example, during the process of modifying the petroleum legislation in Mexico, in 2008, the PRD (Institutional Revolutionary Party), attacked the reform arguing that they were “selling PEMEX to foreigners”. Many people who do not know the law in force nor the direction of the reform, including people with higher education, defended this position, supporting it with television and radio commercials without having a real knowledge of the subject. As part of this “anti-oil reform” campaign, the PRD called on 27 July of that year for a public consultation to obtain the view the Mexican citizens. However, this view was not real and was manipulated by the way the questions were asked and by the television and radio campaigns that misinformed the public.<sup>561</sup>

The questions were: (i) Nowadays, the operation, transportation, distribution, storage and refining of hydrocarbons (oil and gas) are exclusive activities of the government. Do you agree or disagree that private companies can participate in such activities?, (ii) in general, do you agree or disagree with the adoption of the initiatives reform currently under discussion in the Congress of the Union?.

<sup>558</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 103.

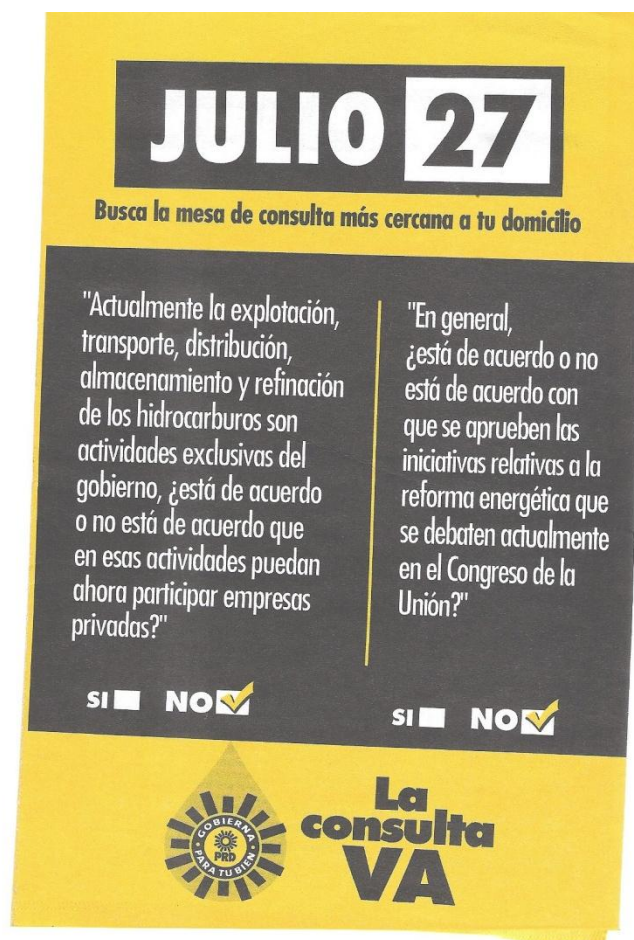
<sup>559</sup> See supra pp. 79,172 and 179.

<sup>560</sup> The term “Lynch law” comes, apparently, from the judicial practices carried out in Virginia by Charles Lynch (1736-1786), which condemned people without having the guarantee of a legal trial. Robles, Gregorio, Op.cit, footnote No. 5, pp. 109.

<sup>561</sup> See the results on: [http://www.consultaenergetica.df.gob.mx/pdf/resultados\\_totales.pdf](http://www.consultaenergetica.df.gob.mx/pdf/resultados_totales.pdf)

Below there is the flyer that circulated at that time (prior to public consultation) which is clearly marked the box “NO”. We believe it was a clear way of trying to manipulate society even telling them the aim of the opinion they should manifest.

#### Consultation flyer (PRD)



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## 4.2 The Oil & Gas Legislation in Mexico.

### 4.2.1 Important Legal Reforms during the Last Years.

In accordance with Guillermo Rodríguez y Rodríguez, an expert in energy law in Mexico, from a retrospective vision focused into the last decades of the century XIX and into the evolution of the processes for the use of the mineral and oil resources, as well as into the evolution of the natural resources needed for the generation of electric energy, it is confirmed that the evolution and the existing changes in the petroleum and electric national industries, have been similar. Since the beginning, there was a concentration of goods and energy companies in foreign hands, which operated as monopolies; and later on, after the

<sup>562</sup> The flyers were handed on the streets.

petroleum expropriation in 1938 and the nationalization of the electric industry in 1960, both were ruled by a legal framework with nationalist spirit. Coincidentally, during the last decades of the century XX, outlines for the use of resources were set out,<sup>563</sup> demanding higher efficiency processes and showing possibilities to reach the sought socioeconomic development; and further on, during the last decade of the last century, and in the first one of the current century, transcendental changes are performed in the energy sector of which we are briefly explaining below.<sup>564</sup>

#### 4.2.1.1 Electricity.

The legal reforms of 1992 modified the Electric Energy Public Utility Law<sup>565</sup> in order to precise the activities in charge to the state and the activities left within the competence scope of the individuals. As for the constitutional provisions, and previous to the granting of the permits by the now-known Ministry of Energy, considering the criteria and guidelines of national energy policies and listening to the Electricity Federal Commission (CFE), the individuals can, according to the new legislation, perform the following activities that are not considered as public utility: self-supply of electric energy to satisfy own needs for individuals and companies; co-generation; independent production, with the only purpose to totally assign it to the purchase of CFE; small production; export and import. The electric energy generation assign to the use in emergencies caused by interruptions is also included amongst the activities that do not constitute a public utility, and it does not require a permit.

The figures of external producers foreseen by law, recognize the individual's right to self-supply and co-generate with the same purpose, to import the energy that their own necessities require, to export what they generate, or to satisfy the demand of small rural communities or isolated areas that are lacking of the service.

In the case of small production, in the limited variant up to a maximum of 30 MW and in the independent production, the permit-holders shall work together with the state by

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<sup>563</sup> On the occasion of the registered world-wide energy crisis in the year of 1973, the majority of the industrialized countries adopted policies of conservation of energy, which, in the case of the electrical sector, focused to perform investments to improve the efficiency and to administer the demand. In Mexico, the analysis of the capacity installed (MW) by type of power station allows us to conclude that indeed as of that critical year an important activity in the field of the energetic diversification is observed, as can be seen from the following data: from 1973 to 1993, the capacity in hydroelectric plants was increased from 3446 to 8171; in geothermy, it went from 75 to 740; in coal, from 37 to 1900 and in nuclear it registers a capacity of 675 from 1990 to 1993. This does not mean that they have been stopped consuming fossil fuels, but reflects the governmental preoccupation to use mainly other power plants as of 1973. Other facts that make patent the intention of the government are, among others, the inclusion of saving subjects and efficient use of the energy in the processes of national planning; the creation in 1989 of the National Commission for Energy Savings and the establishment, the same year, within the Federal Commission of Electricity, of the Program of Saving of Energy for the electrical sector (PAESE); and the creation, in 1990, of the Trust of Support to the Program of Saving of Energy of the Electric Sector (FIDE).

<sup>564</sup> Rodríguez y Rodríguez, Guillermo. "El Sector Eléctrico de México", Comisión Federal de Electricidad y Fondo de Cultura Económica, Mexico, 1994.

<sup>565</sup> In Spanish: "Ley del Servicio Público de Energía Eléctrica".

submitting the energy required by the CFE to comply with its objectives of public utility. In the first case, the development of projects with the use of renewable resources of energy are encouraged, and in both cases deferring the investments charged to the service supplier.

#### 4.2.1.2 Oil & Gas.

In 1992, there was an important reform in the gas field.<sup>566</sup> On 8 April 2008, the Federal Executive Power presented to the H. President of the Chamber of the Senates of the Honourable Congress of the Union, several law proposals, suggesting an energetic reform mainly focused into the petroleum ambit, pointing out that its purpose was to stronger PEMEX. He complementary set out other reforms that would allow to rule the works and acquisitions of the entity, to reach a greater flexibility as for the taxing and collecting ambit, to achieve adaptations to its tax system regime, to strengthen the corporate structure, to add a new control and taxation model, to check the faculties and structures of the regulatory entities and to provide to Mexicans, with the due transparency, the information regarding its activities.<sup>567</sup>

The Energy and Legislative Studies Commissions of the Senate of the Republic called for several round tables for the debate on the energetic reform to be held from 13 May to 22 July 2008, with the purpose to discuss the following topics: (i) Principles that must rule the energetic reform that Mexico is needed; (ii) Tax Regime of PEMEX, public budget and finances; (iii) Resources exploration, exploitation and restitution; (iv) Transborder oilfields: negotiation, exploration and exploitation; (v) Oil and gas self-sufficiency (petroleum refining); (vi) Technology and scientific research in the field of petroleum; (vii) Transportation, storage and distribution of hydrocarbons and combustibles; (viii)

<sup>566</sup> See supra p.191 and infra pp. 226.

<sup>567</sup> The Bibliography used for this legal analysis is: the Federal Official Journal of: 23 of December of 1992, 11 of May, 31 of October and 8 of November of 1995. The Initiatives presented by the President of Mexico dated 8 April of 2008, including: (i) Reforms and Implementations to the Regulatory Law of Article 27 Constitutional in the area of Petroleum; (ii) Reforms to the Organic Law of Public Federal Administration; (iii) Organic Law of Petróleos Mexicanos and Subsidiary Agencies; (iv) Reforms of the Law of the Regulatory Federal Commission, and (v) Law of the Petroleum Commission. The Federal Official Journal of 28 of November of 2008 where was published: (i) the Decree that issues the Law of Petróleos Mexicanos; (ii) the Decree that reforms and implements several provisions of the Regulatory Law of Article 27 Constitutional in the area of Petroleum; (iii) Decree that reforms and implements Article 33 of the Organic Law of Public Federal Administration; (iv) Decree that issues the Law of the Hydrocarbons National Commission; (v) Decree that reforms, implements and derogates several provisions of the Law of the Regulatory Energy Commission; (vi) Decree that issues the Law for the Sustainable Use of Energy; (vii) Decree that issues the Law for the Use of Renewable Energies and the Energy Transition Financing; (viii) Decree that implements Article 3 of the Federal Law of the Parastate Entities and Article 1 of the Law of Public Works and Related Services and the third paragraph of Article 1 of the Law of Acquisitions, Rents and Services of the Public Sector. Also: Forums for the debate of the energetic reform, in the web-page of the Senate of the Republic: [www.senado.gob.mx](http://www.senado.gob.mx). The Regulatory Energy Commission. Information contained in its web-page: [www.cre.gob.mx](http://www.cre.gob.mx). Petróleos Mexicanos. Information contained in its web-page: [www.PEMEX.com](http://www.PEMEX.com). The Ministry of Energy. Information contained in its web-page: [www.sener.gob.mx](http://www.sener.gob.mx). The Regulatory Law of Article 27 Constitutional in the area of Petroleum. The Law of the Regulatory Energy Commission. The Organic Law of Petróleos Mexicanos and Subsidiary Agencies. The Secondary Law of Natural Gas.



Organization and administration of PEMEX; (ix) Policy and instruments to boost the national industry related to the oil and gas sector (supplying and construction); (x) Policy and instruments to boost the petrochemical industry; (xi) Regulatory bodies of the oil and gas and energy activities, and (xii) Transparency, accountability and combat to the corruption in PEMEX.

The discussion of the law proposals presented by the President of Mexico and by the opposing political parties (Institutional Revolutionary Party and Democratic Revolution Party) was developed considering a strict constitutional frame surrounding the petroleum subject matter, which mainly covers what is foreseen by articles 25, 27 and 28 of the Mexican constitution. Out of the content of the mentioned articles, it is concluded the following premises: the Nation has the property and domain of the oil and gas resources; in this matter there will not be concessions nor contracts that violate the constitutional mandate; the use and exploitation of the resources belongs only to the Nation, and the state keeps the ownership and the control on PEMEX.

On November 2008, after having carried out the official publication of the called Petroleum Reform, the President of Mexico proposed to the Senate of the Republic, which later on approved, the appointment of four Professionals Advisers that will be part of the Board of Directors of PEMEX. Time later, the formation of the new Hydrocarbons National Commission was published, and from 2009, besides of the integration of the Energy National Council and the issuance of its functioning rules, the President of Mexico has been issuing the complementary regulation to these reforms.

The laws and decrees published on the Official Journal of the Federation (DOF), contribute to strengthen the state rectory in the strategic areas of the Oil and Gas Sector, at the same time that the mechanisms are established to guaranty the energetic security for future generations and to set up the basis for the energetic transition of Mexico.

Amongst other relevant aspects of the legal framework that came into force a day after its publication in the DOF, it can be highlighted:

#### **4.2.1.2.1 The Law of Petróleos Mexicanos.<sup>568</sup>**

As pointed out by the Ministry of Energy, with the new law, PEMEX was granted more decision-making, administrative and contracting faculties; it shall have financing and collecting autonomy; a greater transparency with accounting obligations; greater environmental responsibilities, and is now able to issue Citizen Bonds, as entailment and transparency instruments.

Specifically we pointed out some of the relevant aspects of theses regulation:

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<sup>568</sup> In Spanish “La Ley de Petróleos Mexicanos”.

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- (i) The Board of Directors has the faculty to determine the organizational structure of the subsidiary agencies;
  - (ii) Four Professional Advisers were incorporated to the Board, in consistency with the establishment of a corporate government regime. In order to give value to the vote of these Advisers, any determination adopted by the Board, will require the favourable vote of at least two Professional Advisers; if not, the affair shall be postponed to the next session to be approved, in any case, by a simple majority.
  - (iii) The Board will exercise the central conduction and the strategic direction of the entity and has been granted attributes in debts, budget and acquisition matters, renting, services and works;
  - (iv) Several committees are set up to assure that the Advisers are linked to the operation and decision-making of PEMEX;
  - (v) Functions for different stages of surveillance and taxing are foreseen and the attributions for ruling compliance verification are kept to the Ministry of Public Function and to the Internal Control Body.
  - (vi) The Examiner assumes the function to render a report to the President of the Republic on the submitted and processed information by the Board of Directors, and to represent the interests of the citizen bonds holders;
  - (vii) A set of rules to rule the obligations and responsibilities of the Advisors is foreseen. Even, the compensation for caused damages.
  - (viii) It is more flexible the debt contracting subject to the guidelines issued by the Ministry of Tax and Public Credit (SHCP);
  - (ix) It is ruled the possibility that PEMEX issue citizen bonds that give their holders an income linked to the performance of such an agency. The economic resources obtained from the selling of those bonds, will be aimed to the financing of productive works with return rates higher than those of the financial cost of the agency.
  - (x) Provisions were agreed determining a particular regime for budgetary matters, in the sense that they allow PEMEX to use its own income excess and approve adjustments to its budget, without counting with the previous authorization of the SHCP; creating besides a simplify procedure for the registration of its investment projects;
  - (xi) As for acquisitions, renting, utilities and building public works matters, a dual regime was approved: (i) for substantive activities of the oil and gas industry, a particular regime was set up based on article 134 of the Constitution, and according to the provisions issued by the Board of Directors, subject, as a general rule, to

public biddings procedures, and exceptionally, to direct adjudication and to restricted invitation, and (ii) the other activities are ruled by the applicable legislation in acquisitions and renting matters as well as services of the public sector and related works and services matters;

- (xii) Contracting methods for works and services are foreseen, determining what is permitted and prohibited. As an example, the contracts that give the individuals the property of the hydrocarbons or of the oil and gas resources are prohibited, as well as those that pretend to share a percentage of the production or of the value of its sales. On the other hand, the contracts that compensate or give an incentive to the supplier or contractor who has reached good results that benefit PEMEX are allowed.
- (xiii) Specific obligations for transparency and accounting are foreseen, in order to inform, annually and every three months, to the Congress of the Union about the running of the entity; and to the SHCP about the use of the debt, and
- (xiv) Obligations are foreseen for PEMEX to require, in their contracts, a minimum percentage of national content, and to give preference to the proposals that employ human resources, goods or services of national origin.

#### **4.2.1.2.2 Regulatory Law of Article 27 Constitutional in the Petroleum Industry.<sup>569</sup>**

When reforming this law, the Congress, after a very broad consultation that gathered distinguished specialists in the energetic field:

- (i) Ratifies that it entitles the Nation the direct domain, inalienable and non-lapsable action of all the carbons of hydrogen that are found in the national territory and defines and specifies the way of exploitation of the cross-border oilfield.
- (ii) Incorporates and abides the associated gas to the mineral coal oilfield, by the applicable provisions to the transportation, storage and distribution of natural gas established since 1995.
- (iii) Clearly incorporates to the energy national strategy several criteria for PEMEX to do its activities in accordance with the national interests (energetic security of the country, sustainability of the hydrocarbons annual extraction platform, market diversification, incorporation of the greatest value added to its products, development of the national productive plant, and environmental protection).
- (iv) Clearly foresees the criteria for the work contracting and the service rendering, considering that the income will be always in cash, and in no case, the property on the hydrocarbons will be granted, neither for the services rendered nor for the works performed. It cannot be possible to make shared-production contracts or any

<sup>569</sup> In Spanish: “Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo”.

contract that compromises percentages of the production or of the value of the sales of the hydrocarbons nor of their derived products, nor of the profit of the contracting entity. It pointed out that PEMEX cannot agree, in no case, a foreign jurisdiction in controversies arisen from a work contracts and service rendering in national territory and in the areas where the Nation has sovereignty, jurisdiction or competence; and that the contracts can include arbitration clauses in accordance with the national legislation and with the international treaties in which Mexico is a party.

- (v) Besides of the pipeline construction activities, it also considers as public utility the storage plants.
- (vi) Entrusts the ruling of the oil and gas industry to the President of Mexico, via the Ministry of Energy, with the corresponding participation to the new Hydrocarbons National Commission and to the Regulatory Energy Commission.
- (vii) Improves the provisions regarding the obligations that should be complied with by PEMEX and its subsidiary agencies, and the permit-holders in general, as well as the penalties that the authorities might apply in case of a failure to execute.
- (viii) Empowers the authorities to order interim measures, when a work or installation represent a high danger for people or their goods.

#### **4.2.1.2.3 Article 33 of the Organic Law of the Federal Public Administration.**<sup>570</sup>

The reforms and implementations of this article redefine the attributions of the Ministry of Energy, highlighting, amongst other things:

- (i) To establish the energetic policy.
- (ii) To perform the energetic planning in a short and long term, attending pre-established criteria: the sovereignty and the energetic security, the improvement of the energetic productivity, the restitution of the hydrocarbons resources, the progressive reduction of environmental impacts of the energy production and consuming, the greater participation of the renewable energies into the national energetic balance, the satisfaction of the basic energetic necessities of the population, the energy saving and the greater production and use efficiency, the strengthening of the public entities of the energetic sector as public bodies, as well as the support and the research and the national technology development in energetic matters.
- (iii) To integrate the Energy National Council and to issue its functioning rules to perform energy planning works.

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<sup>570</sup> In Spanish: “Ley Orgánica de la Administración Pública Federal”.

- (iv) To approve the main hydrocarbon exploration and exploitation projects that PEMEX elaborates utilizing the ruling issued by the new Hydrocarbons National Commission.
- (v) To govern and promote the development and use of hydrocarbon alternative energy resources and to propose the corresponding incentives.
- (vi) To propose to the President of Mexico the annual platform of oil and gas production of PEMEX.
- (vii) To establish the policy for hydrocarbons resources restitution, and
- (viii) To register and make public the hydrocarbons resources.

#### **4.2.1.2.4 The Law of the Hydrocarbons National Commission.<sup>571</sup>**

The Hydrocarbons National Commission was set up, as a non-centralized organ of the Ministry of Energy (SENER), that will have the objective to rule and supervise the exploration and extraction of carbons of hydrogen that are found in strata or oilfields, whatever their physical state is, including the intermediate state, and that make up mineral crude oil, accompany it or derive there from, as well as the processing, transportation or storage activities, that are directly related to the projects of hydrocarbons exploration or extraction.

It is not included within its scope: refining, storage, transportation, distribution and first-hand sales of petroleum and the products that are obtained from its refining; the elaboration, storage, transportation and first-hand sales of gas; everything related to gas associated to the mineral carbon oilfields, and elaboration, storage, transportation, distribution and first-hand sales of those products that come from oil and gas, that are susceptible to be used as basic industrial raw materials, that constitute basic petrochemicals.

The Ministry of Energy has pointed out that this Hydrocarbons National Commission “shall count with the administration, technical and economic capacity, required to try that the exploration and extraction hydrocarbons projects, observe the following criteria: to maximize the oil renting, to replace the hydrocarbons resources, to employ the most adequate technology, to protect the environmental and the sustainability of the natural resources, and take care of the necessary conditions in industrial security matters.”

Amongst its main attributions are emphasized:

- (i) To contribute the technical elements for the design and definition of the hydrocarbons policy of the country and for the formulation of the sectorial programs in the field of exploration and extraction of hydrocarbons;

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<sup>571</sup> In Spanish: “Ley de la Comisión Nacional de Hidrocarburos”.

- (ii) To be the technical arm of the Ministry of Energy.
- (iii) To participate in the determination of the hydrocarbons resources restitution policy and to establish provisions and technical guidelines applicable to the exploration and extraction of hydrocarbons and to the design of the related projects.
- (iv) To pass technical judgment on the hydrocarbons exploration and exploitation projects, and perform evaluation, quantification and verification studies to the oil resources.
- (v) To set up and run a public Petroleum Registry.

#### **4.2.1.2.5 Law of the Regulatory Energy Commission (CRE).<sup>572</sup>**

The CRE, set up since 1995, has now a wider object and assume new faculties. Its object was added with the following activities of which efficient development must be promoted:

- (i) The first-hand sales of fuel and of the basic petrochemicals.
- (ii) The Transportation and distribution of those products obtained from the refining of petroleum and of basic petrochemicals, which is executed throughout pipelines, as well as the storage systems that are directly linked to the transportation or pipeline-distribution systems, or that formed comprehensive part of the import or distribution terminals, of those products.
- (iii) The Transportation and distribution of bioenergetics that is executed throughout pipelines, as well as their storage that is directly linked to the transportation or pipeline-distribution systems, as well as the import or distribution terminals, of those products.

The attributions that the law granted to the CRE in 1995 were added in order to consider, besides gas, fuel, basic petrochemicals and bioenergetics, when granting permits, methodologies to determine prices, terms and conditions for the rendering of services, determination of geographical zones, etc.

#### **4.2.1.2.6 The Law for the Sustainable Use of the Energy.<sup>573</sup>**

This law has the object to promote a sustainable use of energy, throughout its optimum use in all its processes and activities, from its exploitation until its consumption.

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<sup>572</sup> In Spanish: “Ley de la Comisión Reguladora de Energía”

<sup>573</sup> In Spanish: “Ley para el Aprovechamiento Sustentable de la Energía”.



The new wording foresees the incorporation of objectives and strategies into the Development of a National Plan for the sustainable use of energy, according to which a national program that promotes social participation and compromise will be elaborated, with the aim to link the public sector institutions, to the civil social and private sector organizations, to the academic institutions and to population in general. To such a national program two strategies are incorporated: the modernization of long distance and closeness collective transportation based on electric transportation systems and the substitution of incandescent lamps for fluorescent electric energy saving lamps.

The National Commission for the Efficient Use of Energy was set up, which substitutes the current Saving Energy National Commission, and as a consulting body of that, a Consultative Council for the Energy Sustainable Use was incorporated. It was established a national subsystem of information on the use of energy with a purpose to register, organize, bring up to date and spread information on the energy consumption of its main final-users, the factors that give a boost to those final uses and the indicators of national efficiency energy and of other countries.

#### **4.2.1.2.7 The Law for the Use of Renewable Energies and the Energy Transition Financing.<sup>574</sup>**

This law has the objective to govern the use of renewable energy sources and the clean technologies to generate electricity with different aim to the public utility of electric energy, as well as to establish the national strategy and the instruments to finance the energy transition. The law excludes the regulation, as sources to generate electric energy: of the radioactive minerals to generate nuclear energy, of the hydraulic energy of sources with capacity to generate more than 30 megawatts, of the industrial residues or of any kind when they are incinerated or get any other type of thermal treatment, and the use of sanitary stuff which do not comply with the environmental legislation.

Likewise, the law foresees that the use of renewable energy sources and the use of clean technologies be executed within the framework of a national strategy for the energetic transition, with the participation of the Ministry of Energy and the Regulatory Energy Commission, and also foresees the intervention of the Ministry of Economy in relation to the fomentation of a greater national integration of equipments and components for the use of the renewable energies and their efficient transformation.

The before mentioned National Strategy for the Energetic Transition and the Sustainable Use of Energy, implies the installation of a Fund that will count with a Technical Committee that will issue the rules for the administration, assignation and distribution of the resources within the Fund, with the aim to promote the objectives of the Strategy, consisting on:

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<sup>574</sup> In Spanish: “Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética”.

- (i) to boost the policies, programs, actions and projects aimed to get a better utilization and use of the renewable energy resources and the clean techniques, and
- (ii) to promote the efficiency and energetic sustainability, as well as the reduction of the dependence of Mexico of the hydrocarbons as energy primary resource.

The elaboration and application of a Special Program for the Use of Renewable Energies, mandatory for the offices and entities of the Federal Public Administration, and the establishment of this new legal framework, will provide legal certainty to the development and promotion of renewable energies.

#### **4.2.1.2.8 Other Complementary Modifications.**

Additionally to the reforms and implementations that have been briefly commented, there were other modifications that we mention next:

- a) A paragraph was added to article 3° of the Federal Law of State-owned Entities<sup>575</sup> to establish that Petróleos Mexicanos and its subsidiary agencies will be governed by its own rules or decrees of creation and that such a law will be applied only on that not opposed or not foreseen by them.
- b) Article 1° of the Law of Public Works and Related Services<sup>576</sup> and Article 1° of the Law of Acquisitions, Rents and Services of the Public Sector<sup>577</sup>, were amended, in order to exclude from their applicability, the substantive activities of productive character referred to in Articles 3° and 4° of the Regulatory Law of Article 27 Constitutional in the Petroleum Industry, that shall be governed for what is mentioned in its law.

### **4.3 The ADR Legislation in Mexico.**

When analyzing the legal framework in an ADR case, the attorneys at law should take care of the analysis of the rules governing the following: (i) the capacity of the parties; (ii) the arbitral agreement; (iii) the arbitral proceeding (adjective law); (iv) the law for the merits (substantive law); (v) the recognition and enforcement of the arbitral award.

In Mexico, the legal orderings that govern the previous subject matters are: (i) the Political Constitution of the Mexican United States; (ii) the Civil Code for the Federal District and Federal Territories; (iii) the Commerce Code; (iv) the Civil Procedures Federal Code, and; (v) Diverse International Treaties. Next, some commentaries of general character with

<sup>575</sup> In Spanish: “Ley Federal de Entidades Paraestatales”.

<sup>576</sup> In Spanish: “Ley de Obras Públicas y Servicios Relacionados con las Mismas”.

<sup>577</sup> In Spanish: “Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público”.

respect to the Mexican legislation indicated above are expressed, starting from the base of the legal pyramid of our Mexican legal system:

#### 4.3.1 Political Constitution of the United Mexican States.<sup>578</sup>

In the Political Constitution of the Mexican United States, we found some articles that, to some extent, have generated polemic and doubts on the subject matter of ADR, mainly arbitration (articles 13,<sup>579</sup> 14,<sup>580</sup> 16<sup>581</sup> and 17<sup>582</sup>). Without dealing with the constitutional analysis of the rules that have been object of critics, arguing that international private commercial arbitration, would be in violation of the constitutional principles, we limit to mention that we do not consider that this happens, since arbitration is the result of an agreement of wills which conclude in an arbitration award. This award, by itself, does not have any force for its fulfilment, but needs the intervention of the judicial organ of the sovereign state to be able to fulfil the decision therein contained. In the arbitration procedure the essential formalities of the procedure are also foreseen.

There is also a constitutional prohibition to create special courts<sup>583</sup> and exclusive laws, establishing the principle of human equality before the law, and the courts created by the

<sup>578</sup> In Spanish: “Constitución Política de los Estados Unidos Mexicanos”.

<sup>579</sup> “Artículo 13. Nadie puede ser juzgado por leyes privativas ni por tribunales especiales. ...” Translation: “Article 13. No one may be tried by private laws or special tribunals.” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>580</sup> “Artículo 14. ...Nadie podrá ser privado de la vida, de la libertad o de sus propiedades, posesiones o derechos, sino mediante juicio seguido ante los tribunales previamente establecidos, en el que se cumplan las formalidades esenciales del procedimiento y conforme a las leyes expedidas con anterioridad al hecho...” Translation: “Article 14. No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act ...” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>581</sup> “Artículo 16. Nadie puede ser molestado en su persona, familia, domicilio, papeles o posesiones, sino en virtud de mandamiento escrito de la autoridad competente, que funde y motive la causa legal del procedimiento” Translation: “Article 16. No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken ...” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>582</sup> “Artículo 17. ... Ninguna persona podrá hacerse justicia por sí misma, ni ejercer violencia para reclamar su derecho. Toda persona tiene derecho a que se le administre justicia por tribunales que estarán expeditos para impartirla en los plazos y términos que fijen las leyes, emitiendo sus resoluciones de manera pronta, completa e imparcial. Su servicio será gratuito, quedando en consecuencia, prohibidas las costas judiciales. Las leyes federales y locales establecerán los medios necesarios para que se garantice la independencia de los tribunales y la plena jurisdicción de sus resoluciones. ...” Translation: “Article 17. No one may be imprisoned for debts of a purely civil nature. No one may take the law into his own hands, or resort to violence in the enforcement of his rights. The courts shall be open for the administration of justice at such times and under such conditions as the law may establish; their services shall be gratuitous and all judicial costs are, accordingly, prohibited.” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>583</sup> According to Ignacio Burgoa, the special courts are those that are in contrast of the general courts which basic characteristic is the permanence of its executive or decision making functions and the possibility of having valid interference in an unknown number of cases that fits within their jurisdictional scope. In conclusion, the two characteristics of the general courts, are: (i) That the competition or capacity of a judicial, administrative or legislative authority does not stop when concludes the complete knowledge of one or several

state. This principle is not against international private commercial arbitration, in which the arbitral tribunal is the result of the will of the parties, considering the application of the legal dispositions and the absolute respect of the individual guarantees (human rights). On the other hand, the expression “previously established courts” must be understood in a broad sense that includes not only the organs of the Judicial Power, but also all those that have the faculty to decide controversies of impartial way, as it is the case of some administrative authorities or arbitral procedures relying on the principle that the will of the parties is the supreme law of contracts, as long as dispositions of public order are not violated. In the arbitral procedure, it could not be spoken of violation of guarantees, since none of the parties is considered an authority.

Also, the Constitution establishes (article 25)<sup>584</sup> the necessity that the Mexican legislation contains, when establishing the conditions of operation of the private sector, the general aims that the state sets out to reach national development; and, in that sense, a good legislation in the subject matter of arbitration is, without place to doubt, a determining factor to facilitate commercial relations, which is translated into an important element for the development of the national economy. On the other hand; the Mexican arbitration legislation was emanated from the Congress which has the faculty (article 73)<sup>585</sup> to legislate in commercial matter; this faculty is unquestionable and without contravening the own Constitution.

Fraction I of article 104<sup>586</sup> of the Constitution makes us conclude that in the matter of arbitration, for being federal laws both the Commercial Code as well as the treaties in this

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specific cases, but it lasts limitlessly as much as a law not it undresses of its attributions and faculties, and; (ii) That the competition or authoritarian capacity extends to all the present and future cases that are put under or are able to be put under the consideration of the state organ. Then, none of these two characteristics are shown at the so called “special courts”, since they are not created by law, but commonly instituted by means of a sui generis act (decree, administrative or legislative decision formally speaking, etc.), in which their specific purposes of knowledge or interference are briefed (judgments by commission). A special court is only enabled to know one or several determined specific cases, objective for which it was specifically established. The Supreme Court of Mexico has sustained the following concept: “it is understood, for special courts, those which are exclusively created to know, in a certain time, of certain crimes or with respect to determined delinquent ...” Burgoa, Ignacio, “Las Garantías Individuales”, Editorial Porrúa, S.A., México, 1984, p. 283.

<sup>584</sup> “Artículo 25. ...La ley alentará y protegerá la actividad económica que realicen los particulares y proveerá las condiciones para que el desenvolvimiento del sector privado contribuya al desarrollo económico nacional, en los términos que establece esta Constitución.” Translation: “Article 25 The law will encourage and protect the economic activity that the individuals carry out and will provide the conditions so that the unfolding of the private sector contributes to the national economic development, in the terms that this Constitution establishes.”

<sup>585</sup> “Artículo 73. El Congreso tiene facultad:... X. Para legislar en toda la República sobre hidrocarburos, minería, industria cinematográfica, comercio, ... Translation: “Article 73. The Congress has the power: X. To legislate throughout the Republic on hydrocarbons, mining, the motion picture industry, commerce, ...” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>586</sup> “Artículo 104. Corresponde a los tribunales de la federación conocer: I. De todas las controversias del orden civil o criminal que se susciten sobre el cumplimiento y aplicación de leyes federales o de los tratados internacionales celebrados por el Estado Mexicano. Cuando dichas controversias solo afecten intereses particulares, podrán conocer también de ellas, a elección del actor, los jueces y tribunales del orden común de los estados y del Distrito Federal. ...” Translation: “Article 104. The federal courts shall have jurisdiction

matter of which Mexico is a part of, it exists a concurrent jurisdiction.<sup>587</sup> As well as article 133<sup>588</sup> which makes us conclude the normative supremacy that the Constitution enjoys, the laws of the Congress that emanate from it, and the treaties referred in such an article, being included the legal bodies that contain regulatory dispositions on arbitration as well as international treaties on this matter in which Mexico is a part of.

As a conclusion, we can clarify that, establishing that arbitration is not in agreement with the Constitution, would be as absurd as to affirm that the parties have not any right to sign a settlement agreement by means of which a controversy previously arisen comes to an end. Unquestionably this settlement agreement has total validity and in case of not being fulfilled by some of the parties, the winning party can go to the judicial authority to make it comply with, as it happens with the arbitration award. The arbitration is simply a procedure to arrive at that settlement.

#### 4.3.2 Civil Code for the Federal District and Federal Territories.<sup>589</sup>

In the Civil Code two questions related to arbitration are due to analyze, fundamentally: the capacity of the parties, which must be sufficient to commit in arbitrators and the provisions regarding the general theory of obligations.

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over: I. All controversies of a civil or criminal nature that arise from the enforcement and application of federal laws or from treaties made with foreign powers. Whenever such controversies affect only the interests of private parties, the regular local judges and courts of the States, or the Federal District and Territories may also assume jurisdiction, at the election of the plaintiff. ...” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>587</sup> The concurrent jurisdiction is the capacity or faculty that has two or more courts to know the same case. Palomar de Miguel, Juan, “Diccionario de Derecho”, Mayo Ediciones, S. de R. L., México, 1981, p. 764. Héctor Fix-Zamudio, thinks that in our system, to be in agreement with the North American model, where we found two levels of courts - the federals and the locals - is logical that those of federal character correspond the competition to resolve the conflicts derived from the application of the federal laws as well as of international treaties. Fix-Zamudio, Héctor, “Constitución Política de los Estados Unidos Mexicanos. Comentada”, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, México, 1985, pp. 245.

<sup>588</sup> “Artículo 133. Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión. Los jueces de cada Estado se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de los Estados.” Translation: “Article 133. This Constitution, the laws of the Congress of the Union that emanate there from, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf). Art. 133 of the Constitution is related to Art. 15 of this ordering “*in fine*”, that in its conducive part says: “No se autoriza la celebración de tratados para ...; ni de convenios o tratados en virtud de los que se alteren las garantías y derechos establecidos por esta Constitución para el hombre y el ciudadano.” Translation: “Article 15. No treaty shall be authorized for ... Nor shall any agreement or treaty be entered into which restricts or modifies the guarantees and rights which this Constitution grants to the individual and to the citizen.” See the whole text at: [http://www.oas.org/juridico/MLA/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf).

<sup>589</sup> In Spanish: “Código Civil para el Distrito Federal y Territorios Federales”.

As for individuals, we must consider what is established by articles 22<sup>590</sup>, 23<sup>591</sup>, 24<sup>592</sup>, 1798<sup>593</sup> and 1799<sup>594</sup> of the Civil Code, which bear close relation to articles 3 and 5 of the Commercial Code.

All the before mentioned articles, rule the exercise and enjoyment capacity (*capacidad de goce y de ejercicio*) that must have the individuals who are willing to resolve their controversies thru arbitration. It means, the possibility to use this mechanism is limited to “businessmen”, who are a determined group of people, with the ability to contract and to commit themselves. Also, the signers of the arbitration clause can be represented in accordance with articles 1800 and others of the Civil Code.

On the other hand, companies, require a representation, which must be in agreement with articles 2587<sup>595</sup> and 2554<sup>596</sup> fraction III of the Civil Code.

The arbitration agreement, as any contract, is ruled by articles 1792<sup>597</sup>, 1793<sup>598</sup>, 1794<sup>599</sup>, 1795<sup>600</sup>, 1796<sup>601</sup> and 1797<sup>602</sup>, of the Civil Code.

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<sup>590</sup> “Artículo 22. La capacidad jurídica de las personas físicas se adquiere por el nacimiento y se pierde por la muerte; pero desde el momento en que un individuo es concebido, entra bajo la protección de la ley y se le tiene por nacido para los efectos declarados en el presente código.” Translation “Article 22. Legal capacity of individuals is acquired by birth and lost by death; but since the moment an individual is conceived, he/she is protected by law and he/she is considered been born for the effects foreseen in the present code”.

<sup>591</sup> “Artículo 23. La menor edad, el estado de interdicción y las demás incapacidades establecidas por la ley, son restricciones de la personalidad jurídica, que no deben menoscabar la dignidad de la persona ni atentar contra la integridad de la familia; pero los incapaces pueden ejercitar sus derechos o contraer obligaciones por medio de sus representantes.” Translation “Article 23. The minor, the state of interdiction and other incapacities established by law, are restrictions of the legal personality, that should not reduce the dignity of the person nor to attempt against the integrity of the family; but the incapable ones can exercise their rights or contract obligations by means of their representatives.”

<sup>592</sup> “Artículo 24. El mayor de edad tiene la facultad de disponer libremente de su persona y de sus bienes, salvo las limitaciones que establece la ley.” Translation “Article 24. The person of legal age has the faculty to freely provide of its person and of his/her goods, except for the limitations that the law establishes.”

<sup>593</sup> “Artículo 1798. Son hábiles para contratar todas las personas no exceptuadas por la ley.” Translation “Article 1798. All the people non excepted by law, are capable to contract.”

<sup>594</sup> “Artículo 1799. La incapacidad de una de las partes no puede ser invocada por la otra en provecho propio, salvo que sea indivisible el objeto del derecho o de la obligación común.” Translation “Article 1799. The incapacity of one of the parties cannot be invoked by the other, in own benefit, unless it is indivisible the object of the law or the common obligation”.

<sup>595</sup> “Artículo 2587. El procurador no necesita poder o cláusula especial, sino en los casos siguientes: III. Para comprometerse en árbitros.” Translation “Article 2587. The attorney-in-fact does not need to be specially empowered, but in the following cases: III. to commit himself in arbitrators”.

<sup>596</sup> “Artículo 2554. “En todos los poderes generales para pleitos y cobranzas bastará que se diga que se otorga con todas las facultades generales y las especiales que requieran cláusula especial conforme a la ley.” Translation “Article 2554. In all the general powers for lawsuits and collection it will be enough that it is said that it is granted with all the general faculties and the special ones that require special clause according to the law.”

<sup>597</sup> “Artículo 1792. Convenio es el acuerdo de dos o más personas para crear, transferir, modificar, o extinguir obligaciones.” Translation “Article 1792. Contract is the Agreement of two or more people to create, transfer, modify, or extinguish obligations.



In synthesis, in both subject matters applicable to arbitration, capacity of the parties and in respect of general aspects of the theory of obligations, as well as the arbitration agreement and the people who decide the applicability of this method, are sufficiently supported by a legal frame that constitutes a solid guarantee.

#### 4.3.3 Commercial Code.<sup>603</sup>

The Commercial Law in Mexico has been considered federal, instead of a matter of each state as it happens in the United States of America, which avoids problems of legal uniformity.<sup>604</sup> It is important to know the Mexican *lex arbitri*, since it will be of a supplementary application in case Mexico is designated the place or venue of the arbitration.

The general principle that allows the parties to resolve their controversies by means of an arbitration procedure, is included in the Fifth Book, Title I, Chapter I of the Commercial Code, regarding the commercial trials. In this sense, Art. 1051 of this ordering anticipates that the preferred commercial procedure to all is the one that the parties freely agree, being able to be a conventional procedure before courts, which is ruled by what is foreseen in arts. 1052 and 1053 of the Commercial Code, or an arbitration procedure that, where appropriate, will be subject to the provisions of the Title Fourth of the Fifth Book before mentioned.

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<sup>598</sup> “Artículo 1793. Los convenios que producen o transfieren las obligaciones y derechos toman el nombre de contratos.” Translation “Article 1793. The agreements that produce or transfer obligations and rights take the name of contracts.”

<sup>599</sup> “Artículo 1794. Para la existencia del contrato se requiere: Consentimiento; Objeto que pueda ser materia del contrato.” Translation “Article 1794. For the existence of the contract it is required: Consent; Object that can be matter of the contract.”

<sup>600</sup> “Artículo 1795. El contrato puede ser invalidado: Por incapacidad legal de las partes o de una de ellas; Por vicios del consentimiento; Porque su objeto, o su motivo o fin, sea ilícito; Porque el consentimiento no se haya manifestado en la forma que la ley establece.” Translation “Article 1795. The contract can be invalidated: By legal incapacity of the parties or one of them; By vices of the consent; Because its object, or their reason or aim, is illicit; Because the consent has not been pronounced in the form that the law establishes.”

<sup>601</sup> “Artículo 1796. Los contratos se perfeccionan por el mero consentimiento, excepto aquellos que deben revestir una forma establecida por la ley. Desde que se perfeccionan, obligan a los contratantes no sólo al cumplimiento de lo expresamente pactado, sino también a las consecuencias que, según su naturaleza, son conforme a la buena fe, al uso o a la ley.” Translation “Article 1796. Contracts are perfected by the mere consent, except those that must have a form established by law. Ever since they are perfected, they force the contractors not only for the fulfilment of that specifically agreed, but also the consequences that, according to their nature, are according to the good faith, to the use or the law.”

<sup>602</sup> “Artículo 1797: La validez y el cumplimiento de los contratos no pueden dejarse al arbitrio de uno de los contratantes.” Translation “Art. 1797: The validity and the fulfilment of contracts cannot be left to the will of one of the contractors.”

<sup>603</sup> In Spanish: “Código de Comercio”.

<sup>604</sup> See art. 124 of the Constitution.

Therefore, the Title Fourth of the Commercial Code, was denominated “Of the Commercial Arbitration”; that includes articles 1415 to 1480 and it is divided into ten chapters.<sup>605</sup>

Chapter I, denominated “General Provisions”, considers the scope of application of the law, which includes the national<sup>606</sup> commercial arbitration and the international one, when the place of the arbitration is within the national territory, except from the international treaties of which Mexico is part of or in other laws that establish a different procedure or foresee that certain controversies are not susceptible of arbitration.<sup>607</sup> On the other hand, basic concepts in the field of arbitration are established and defined, such as: arbitration agreement (it obviously includes both, the arbitration clause as well as the arbitral commitment), arbitration (it includes the ad-hoc commercial arbitration and the institutional one), international arbitration,<sup>608</sup> costs, expenses and honoraria,<sup>609</sup> as well as the arbitral tribunal. It also defines rules regarding the interpretation of the precepts contained in the law and the service of notice and calculation of terms.<sup>610</sup>

Finally, this chapter establishes the resignation to the right to contest;<sup>611</sup> and in case of requiring judicial intervention during the procedure or after it, the competition of the judge of first federal instance or of the common order of the place where the arbitration is carried out, is foreseen; or, when the place of the arbitration is outside the national territory, of the judge of first federal instance or of the competent common order of the address of the losing party or, by default, of the judge of the location of the goods.<sup>612</sup>

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<sup>605</sup> On 27 January 2011 it was published in the Official Journal of the Federation (DOF) the decree by which the Chapter X was added to this book, which covers 1464-1480 article, entitled “Judicial Intervention in International Business Transactions and Arbitration.”

<sup>606</sup> The model law considers only the scope of application in international arbitrations and, the Mexican legislators, rightly extended this scope to the national arbitrations.

<sup>607</sup> Even though the venue of the arbitration is outside the Mexican territory, the provisions contained in articles 1424, 1425, 1461, 1462 and 1463 of the Commercial Code will be applied. See Art. 1415 of the Commercial Code.

<sup>608</sup> To the effect, we can make notice that point c) of the Model Law that foresees that an arbitration is international if the parties have specifically agreed that the question object in the agreement is related to more than one State, was not included within its reforms to the Commercial Code.

<sup>609</sup> The model law does not contemplate the costs, nor the definition of this concept.

<sup>610</sup> The reform includes in its article 1419 a rule regarding the moment at which it begins to run the calculation of the terms, which is not contemplated by the Model Law.

<sup>611</sup> The reform establishes that if a party continues the arbitration knowing that some provision of the present title has not been fulfilled, and the parties are able to separate from such a provision, or of some requirement in the arbitration agreement, and that party does not express its objection to such breach without justified delay or, if a term is anticipated to do it, the party does not do so, his right to oppose will be understood as resigned. See Art. 1420 of the Commercial Code.

<sup>612</sup> It is necessary to remember that in this matter the judges of first federal instance are the judges of district in civil matter and the civil courts of the common jurisdiction are those of first local instance. This, in agreement with what is established by article 53 of the Organic Law of the Judicial Power of the Federation and its correlatives in the state legislations. For concurrent jurisdiction, see *supra* footnote No. 587.

Chapter II, regarding the “Arbitration Agreement”, rules the way in which this agreement must be made; it means, in writing<sup>613</sup> and in document signed by the parties or in an interchange of letters, telex, telegrams, facsimile or other means of telecommunications, as it can be in a lawsuit and answer to the lawsuit in which the existence of an agreement is affirmed by one party without being denied by the other party,<sup>614</sup> as well as the incompetence of the judge in case a litigation is submitted before him/her on a subject matter which is object to an arbitration agreement, at any moment the parties ask for,<sup>615</sup> unless it is verified that such an agreement is null, ineffective or of impossible execution. It also contemplates the possibility of asking the judge the adoption of interim measures, either prior to the procedural activities or during their course.

Chapter III denominated “Composition of the Arbitral Tribunal”, lets the parties to freely determine the number of arbitrators as well as the procedure for their designation. It is foreseen that, unless agreed by the parties, the number of arbitrators, will be only one,<sup>616</sup> and unless agreed by the parties, the designation will be done by a judge,<sup>617</sup> who in any case, will properly take into account the required conditions stipulated in the agreement between the parties and will adopt the necessary measures to guarantee the appointment of an independent and impartial arbitrator, without the nationality of the person be an obstacle for his designation. Furthermore, it foresees the causes and procedure to challenge an arbitrator, in which case, the substitute will be designated in accordance with the same procedure which was used to designate the one who will be substituted.

Chapter IV, regarding the “Competence of the Arbitral Tribunal”, foresees the faculty of such an organ including the one to decide on its own competence and on the existence and validity of the arbitral agreement. It also foresees the independence of the commitment

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<sup>613</sup> Our previous domestic legislation (article 1052 of the Commercial Code) required in the cases of national arbitration, the formality of writing before public notary or policy before “*corredor*”; or, in judicial agreement, when is the case of arbitration commitment; and if it was the case of an arbitration clause, it was possible to be granted in private or public writing (article 220 of the Code of Civil Procedures for the Federal District, CPCDF).

<sup>614</sup> The reference made in a contract to a document that contains an arbitration clause, will constitute an arbitration agreement as long as such a contract is in writing and the reference implies that the arbitration clause is part of the contract.

<sup>615</sup> On the matter, we can comment that we are not totally in agreement with this provision, because from the reading it is concluded that a judge to whom the solution of a controversy is sent, where an arbitration agreement exists, if it is not by means of a request of some of the parties, the judge could not promote the question of its competition thru inhibiting, as it is established by article 1114 of the Commercial Code. On the other hand, the Model Law establishes that this request will have to be carried out, not later than the presentation of the first writing on the merits; which means, the answer of the request for arbitration, moment in which the *litis* is set up. The mentioned reform does not establish this limitation, which we considered beneficial, because in another way and later to the answer of the request of arbitration, it could not be possible to ask the judge to declare him/herself incompetent.

<sup>616</sup> The Model Law establishes that in case of lack of an agreement between the parties, the arbitrators will be three, which, although can help the neutrality and impartiality as the resolution, it can also be very expensive for the parties, if the amount of the dispute does not justify it.

<sup>617</sup> Both, the Model Law as well as the reform establish that all decision on the questions entrusted to the judge, regarding the appointment of the arbitrators will be unquestionable. On the matter, we must consider that the Mexican Positive Law admits the figure of the *Amparo*, which could be used in this case.

clause with respect to the contract where it is inserted. It also rules the incompetence exceptions of the arbitral tribunal and the one used when the arbitral tribunal exceeded its mandate, as well as the faculty of the arbitral tribunal to order interim measures and guaranties for them.

Chapter V denominated “Proceedings of the Arbitral Activities” has its fundamental base in the principle of equality of the parties, giving to each of them total opportunity to present their case.<sup>618</sup> It grants complete freedom to the parties in the election of the procedure, to which the arbitral tribunal has to fit its activities;<sup>619</sup> as well as freedom to choose the language and the place of the arbitration and, in case of lack of agreement, the decision is to be made by the arbitral tribunal.<sup>620</sup> It is clarified the fact that the designation of certain place that will be the venue of the arbitration, does not limit neither the arbitral tribunal nor the parties, to meet, to hear witnesses, experts or to examine merchandise and other goods in another place.

As any procedure, the first arbitration step occurs with the submission of the lawsuit or request for arbitration where the claimant will express the controversial facts and *litis* as well as the remedy sought; and the defendant, in its answer, will have to talk about all risen up by the claimant, unless otherwise agreed, leaving open the possibility of extending the lawsuit and its answer. In order to contribute with the speed of the procedure, it was settled down the obligation of the parties to contribute, from the moment of the formulation of their statements, all the documents that consider pertinent under their possession, or at least, to make reference to documents or other evidence that pretend to submit.

As for the hearing where evidence and statements are to be presented, unless otherwise agreed by the parties, it is left to the tribunal to decide whether they must be held or if the activities are due to be decided on document and other evidence only. The arbitral tribunal has got the obligation, in case the hearing is carried out, to notify the parties in time, the holding of such a hearing, as well as the meetings of the tribunal to examine merchandise or other goods or documents.

This chapter also foresees the case of a party in default,<sup>621</sup> and the possibility that the tribunal designates experts who must inform it on specific matters, as well as to solicit any party to provide the experts all the pertinent information. Such experts will participate in

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<sup>618</sup> The arbitration activities with respect to a certain controversy will begin in the date in which the defendant has received the requirement to submit that controversy to arbitration.

<sup>619</sup> In case the parties do not agree on a procedure to follow, the reform anticipates that the arbitral tribunal will be able, with subjection to what is mentioned by law, to run the arbitration in the way that considers appropriate. This faculty includes the faculty to determine the admissibility, the relevance and the value of the evidence. The law allows, and is the recommendable thing, the later agreement of the parties with respect to the procedure.

<sup>620</sup> The initiative of the reform considered that national arbitrations had to be in the Spanish language, which was not included in the reform, because doubtlessly it was an important limitation to arbitration. See Art. 1438 of the initiative and the reform.

<sup>621</sup> It is important to make notice that, in case the defendant does not answer the lawsuit, that omission, by itself, is not considered as an acceptance of the alleged thing by the plaintiff.

the later hearings for the presentation of their opinions. Also, it is foreseen the possibility for the arbitral tribunal and any of the parties to ask for court assistance to the competent judge in the carrying-out of evidence.

Chapter VI denominated “Issuing of the Award and Ending of the Procedure” deals, at first, with the fact that the award will be issued in accordance with the law the parties chose,<sup>622</sup> or according to the consciousness of the arbitral tribunal, when it is an arbitration in fairness (or Equity Arbitration)<sup>623</sup>. Also, it must take into account when drafting its resolution the stipulations of the agreement and the mercantile uses applicable to the case.

When the arbitral tribunal is integrated by more than one arbitrator, all the decisions will be made by majority of votes of all the members. The president of the tribunal will be able to decide on questions of procedure.

This chapter foresees the way the award must be issued as well as the reasoning the arbitral tribunal must express, unless it is the result of a transaction between the parties or an arbitration in fairness (or Equity Arbitration).

Finally, it establishes and regulates the termination causes of the arbitral activities, which have the common denominator of trying to resolve the controversy as fair as possible and under a state of equality; without observing whims of the law, as it happens in other legislations. Within this chapter, it is settled down the possibility that the arbitral tribunal correct the award of computational errors, of copy, typesetter or of another similar nature; as well as the interpretation on a point or a concrete part of the award<sup>624</sup> and the possibility of issuing an additional award, in case of claims argued during the arbitral activities but not resolved in the award.

This chapter, as the Model Law, does not establish a term in which the award is due to be issued, which we consider is indispensable to grant security to the parties. Nevertheless, we recognize, depending on the case, that it can be sometimes detrimental for the parties. It is necessary that both orderings foresee it, as long as it is deferrable.

Chapter VII denominated “Of the Costs” is not foreseen in the Model Law, and although the opinion of Jose Maria Abascal<sup>625</sup> is to adopt this law without any modification, we truly

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<sup>622</sup> This provision establishes that when the legislation of certain country is chosen, the parties are referring to the substantive law, and not to its conflict of laws rules. If the parties would not indicate the law that must govern the merits, the arbitral tribunal, taking into consideration the characteristics and connections of the case, will determine the applicable law.

<sup>623</sup> See *supra* pp. 49.

<sup>624</sup> Both, the Model Law and the reform, foresee the obligation according to which the parties are to agree the asking of this interpretation, which we considered erroneous, since, in case the reading of the award benefits one of the parties, such a party will not want to ask for the interpretation, because the interpretation could no longer benefits him/her.

<sup>625</sup> Abascal, José María, “Por qué Conviene a México la adopción de la Ley Modelo de la CNUDMI sobre el Arbitraje Comercial Internacional”, Memorandum elaborado para la Secretaría de Relaciones Exteriores, México, 1991.

believe that himself agrees in integrating this chapter to the Mexican legislation, in order to give security and endorsement to the parties and the arbitrators.

To this respect, this law raises the possibility that the parties adopt, either directly or by reference to an arbitration set of rules, rules regarding the costs of the arbitration, to the effect that the arbitral tribunal fixes them in the award. As far as the honoraria of the arbitral tribunal, these will be of a reasonable amount,<sup>626</sup> taking into account the value of the business, the complexity of the subject, the spent time and other circumstances, being able to consult a judge so that he/she makes his observations on the matter.

The costs will be borne by the losing party; nevertheless, the arbitral tribunal will be able to prorate these costs between the parties if it decides that a proration is reasonable, taking into account the circumstances of the case. The arbitral tribunal will not be able to acquire additional honoraria by the interpretation, rectification or to complete its award.

The arbitral tribunal can ask the parties the payment of a deposit before beginning the arbitral procedure, with the intention of guaranteeing the expenses, being able to require new deposits during the procedure.

Chapter VIII, denominated “Of the Invalidity of the Award”,<sup>627</sup> anticipates that it is the judge who has the capacity to declare this invalidity, which will be incidentally processed and it will not be object to any appeal.<sup>628</sup> This happens when the party that tries this action demonstrates the incapacity of some of the parties or the invalidity of the arbitration agreement by virtue of the applicable law chosen by the parties; or, if nothing had been indicated, according to Mexican legislation. Also, it is possible to be alleged, as an invalidity cause that any of the parties was not dully notified of the designation of an arbitrator or of the arbitration activities, or was not able, for any creditable reason, to present his/her case on the merits; or that the award deals with a non-predicted controversy in the arbitration agreement or contains decisions that exceed the terms of the arbitration agreement; in this case, they will only be null those that exceed. Finally, when the composition of the arbitral tribunal or the by arbitration procedure did not adjust to the agreement signed between the parties. Also it will be an invalidity cause that the judge verifies that, in accordance with the Mexican law, the controversy is not susceptible of arbitration or the award is in opposition to the public order.

It is important to consider, that the Model Law as much as the Mexican legislation, and generally all the international legislation in arbitration matter, only contemplate invalidity

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<sup>626</sup> The doubt arises on what a reasonable amount is.

<sup>627</sup> In the Model Law, the equivalent of this is chapter VII denominated “challenge of the award”, since this legal ordering does not consider the chapter referring to costs, as it does the Mexican law.

<sup>628</sup> Article 1460 of the Mexican law includes the way in which this incident will be treated, as well as the fact that it will not be object of any resource. This rule was work of the Mexican legislators, without precedent in the text of the Model Law.



as the unique resource against the arbitration award, when the procedure was not followed as it should have been.

Chapter IX denominated “Recognition and Enforcement of Awards”<sup>629</sup> establishes that the arbitral awards, whatever the country in which they have been issued, will be recognized as binding and, after the request to the judge by any of the parties, will be executed in accordance with Mexican legislation. This procedure will be incidentally processed and its resolution will not be object of any resource. Also, requirements are settled down that are due to accompany when asking the recognition of enforcement, and the cases in which the judge can deny the recognition.<sup>630</sup>

On the recognition and enforcement of foreign arbitral awards, it is necessary to remember that in our internal legislation we have the New York Convention of 1958, mentioned previously in the present work, and that rules this subject.

Chapter X denominated “Of Judicial Intervention in the Commercial Transaction and Arbitration” establishes that when a party requests the referral to arbitration, the judge will immediately resolve.<sup>631</sup> If the judge orders it, the stay of the procedure will be ordered and once the arbitration is finished, the judge will terminate the trial. Otherwise, the stay of the proceeding will be lifted and the trial will continue. Similarly, the judge will intervene in case of request for appointment of arbitrators<sup>632</sup>; request for assistance in presentation of evidence; and consultation on the fees of the Arbitral Tribunal. On the other hand, this chapter states that there is no need for homologation for the recognition and enforcement of foreign arbitral awards. It talks about the rules for the special trial that should be promoted when applying for recognition and enforcement as a defense in a court trial or other proceeding, as well as that the special court trials on the annulment or recognition and enforcement of commercial arbitral awards can be cumulative. Finally, with regard to interim measures, it states that the judge will have full discretion in the adoption of interim measures and that may be denied recognition or enforcement of an injunction only in cases provided therein.

We can conclude that the points that defer between the Model Law and the Mexican legislation, are the following:

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<sup>629</sup> Its equivalent in the Model Law is chapter VIII.

<sup>630</sup> The text of the reform proposal established one more situation than those mentioned in the Model Law and the final version published in the Official Journal, regarding the causes a judge can use to deny the execution of an arbitral award. Such a point foresees “When it is the case of arbitration awards issued abroad as a result of an action on buildings located in the national territory.” This part of the law is the result of national protectionism that we have in our country, which we did not criticize it but we supported it.

<sup>631</sup> It will only deny referral to arbitration, if it is shown by a final decision, either as a court judgment or arbitral award, that the nullity of the arbitration agreement was declared, or if the nullity, ineffectiveness or the impossible enforceability of the arbitration agreement, are notorious.

<sup>632</sup> In appointing an arbitrator or arbitrators or when ordering the interim measures, the judge must first hear the parties, he/she must first consult with one or more arbitration institutions, chambers of commerce or industry. If the judge determines that the list is not appropriate, this chapter establishes rules to follow. There is not appeal against the Judge’s decision, except as provided by law.

1. The Mexican law does not follow the writing of the text of the Model Law (titles and chapters) and it is found within the Commercial Code; it means, it is not an independent ordering.
2. The Mexican law establishes that, unless otherwise agreed by the parties, the arbitral tribunal will be integrated by a sole arbitrator, unlike the Model Law that establishes three members.
3. Unless otherwise agreed by the parties on the substantive law, the Mexican law establishes that the arbitral tribunal will determine it, taking care of the circumstances of the case and the Model Law, addresses such determination to the conflict of laws.
4. The Mexican law develops the subject of the costs and the calculation of terms (which source of inspiration to the Mexican legislators was the text of the Facultative Rules of the CNUDMI), which we do not see in the Model Law.
5. In the procedures of invalidity and recognition and enforcement of awards, the Mexican law establishes as supplement ordering, the Civil Procedural Federal Code, and the Model Law does not make a similar subsection of supplementarity.

#### **4.3.4 Civil Procedural Federal Code.**<sup>633</sup>

Chapter VI denominated “enforcement of judgments”, of the Unique Title, Fourth Book denominated “of the International Procedural Cooperation” of the Federal Code of Civil Procedures (CFPC),<sup>634</sup> established the way in which the sentences, the private arbitral awards and other foreign jurisdictional resolutions, would be recognized and enforced. Nevertheless, the Mexican legislators, as a result of the adaptation of the domestic legislation to the legal changes that are occurring in the international law, carried out a reform to this ordering, in their conducive part, to exclude the private arbitral awards of commercial character.<sup>635</sup> At present, as it has been already said, the recognition and enforcement of foreign arbitral awards is rules by the Commercial Code, as well as by the New York Convention and the Panama Convention.

Article 360 of the CFPC contains rules regarding the procedure for invalidity of the arbitral awards and their recognition and enforcement. This procedure, as mentioned before, is incidentally processed:

*“Article 360 - Promoted the procedure, the judge will command the service of notice to the other parties by the term of three days. Once the mentioned*

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<sup>633</sup> In Spanish: “Código Federal de Procedimientos Civiles”.

<sup>634</sup> Publicado en el DOF el 24 de febrero de 1942.

<sup>635</sup> Articles 569, first and last paragraphs; 570, and; 571, first paragraph, were reformed. The initiative of this reform to the Congress, by the Executive of the Federation, was carried out on the 31 of May of 1993, and the reform was published in the DOF on the 22 of July of 1993.

*term has passed, if the parties do not promote evidence nor the arbitral tribunal considers them necessary, the parties will be required to attend, within the three following days, the hearing of pleas, were the attendance or the absence of the parties will be verified. If evidence is promoted, or the arbitral tribunal considers it necessary, a probative period of ten days will be open and the hearing will be held in the form mentioned in chapter V of the title first of this book. In any of the previous cases, the tribunal, within the five following days, will issue its resolution.*<sup>636</sup>

When the intervention of the judge is asked to take care of this procedure, it is recommended to go before the common jurisdiction instead of going before the federal jurisdiction, since its priority is Amparo procedure, although of course, both can enforce the award.

#### **4.3.5 Art. 72 of the Law of Petróleos Mexicanos.**<sup>637</sup>

As for the specific case of petroleum, and in this stage of the analysis of the applicable legal frame in the industry of the ADR in Mexico, it must be mentioned article 72 of Law of Mexican Petroleum. To this effect we should go some time ago to be able to understand this provision. Within the tendency of the legislative adjustment, of great importance is the case of the Mexican Petroleum and Subsidiary Organisms Organic Law and the case of the Electric Energy Public Utility Law<sup>638</sup>, which provisions in the subject matter of resolution of controversies foreseen until the year of 1992 the necessity that these were subject, in all the cases, to the intervention of the competent federal courts<sup>639</sup>. During this year a new law

<sup>636</sup> The text in Spanish says: “Artículo 360- Promovido el incidente, el juez mandará dar traslado a las otras partes por el término de tres días. Transcurrido el mencionado término, si las partes no promovieren pruebas ni el tribunal las estimare necesarias, se citará, para dentro de los tres días siguientes, a la audiencia de alegatos, la que se verificará concurran o no las partes. Si se promoviere prueba, o el tribunal la estimare necesaria, se abrirá una dilación probatoria de diez días y se verificará la audiencia en la forma mencionada en el capítulo V del título primero de este libro. En cualquiera de los casos anteriores, el tribunal, dentro de los cinco días siguientes, dictará su resolución.”

<sup>637</sup> In Spanish: “Ley de Petróleos Mexicanos”.

<sup>638</sup> See supra pp. 191.

<sup>639</sup> Article 14 of the Mexican Petroleum and Subsidiary Organisms Organic Law, foreseen: “Artículo 14. En todos los actos, convenios y contratos en que intervengan los organismos descentralizados a que esta Ley se refiere, serán aplicables las leyes federales; las controversias nacionales en que sean parte, cualquiera que sea su naturaleza, serán de la competencia exclusiva de los Tribunales de la Federación, quedando exceptuados de otorgar las garantías que los ordenamientos legales exijan a las partes, aún en los casos de controversias judiciales.” Translation: “Article 14. In all the acts, agreements and contracts in which the decentralized organisms to which this Law talks about, take part, will be applicable the federal laws; the national controversies in which they are part, whatever their nature, will be of the exclusive jurisdiction of the Federal Courts, being excepted to grant the guarantees that the legal orderings demand to the parties, still in the cases of judicial controversies.”

Article 45 of the Electric Energy Public utility Law foresees: “Artículo 45. En todos los actos, convenios y contratos en que intervenga la Comisión Federal de Electricidad serán aplicables las leyes federales conducentes, y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia exclusiva de los Tribunales de la Federación, quedando exceptuada de otorgar las garantías que los ordenamientos legales exijan a las partes, aún en los casos de controversias judiciales.” Translation:

was published that governs the oil industry, and diverse dispositions of the electrical public utility law were reformed as well. In both cases it was established that the competition of the federal courts would be limited to the solution of national controversies, leaving open the possibility that those considered as international, can agree an arbitration agreement, if so is advisable. Doubtlessly, it is an advance to modernize the commercial operations that the organizations of the federal government carry out.

Then, article 72 of the new Law of *Petróleos Mexicanos* continues with the same direction and establishes that:

*“Article 72. - The legal transactions that *Petróleos Mexicanos* and their subsidiary organisms make, will be ruled by the applicable federal laws and the national controversies in which it be part of, whatever their nature, will be of the competition of the Federal courts, except for an arbitration agreement, being excepted to grant the guarantees that the legal orderings demand to the parties, even in the cases of judicial controversies. Concerning legal transactions of international character, *Petróleos Mexicanos* and their subsidiary organisms will be able to agree the application of a foreign legislation, the jurisdiction of foreign courts in mercantile subjects and to sign arbitration agreements when thus it agrees to the best fulfilment of its object.”<sup>640</sup>*

#### **4.3.6 Art. 22 of the Federal Law of State-Owned Entities.**<sup>641</sup>

Finally, another legal ordering that is related to the subject matter of the ADR in the Oil & Gas sector is the Federal Law of State-Owned Entities, since it is the general applicable legislation and coherent with the special norm of the law of *Petróleos Mexicanos*. On the matter, this article establishes:

*Article 22: “The general directors of the decentralized organisms, as far as concerns their legal representation, notwithstanding the faculties they are granted in other laws, orderings or statutes, will be expressly authorized to:*

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“Article 45. In all the acts, agreements and contracts in which the Electricity Federal Commission take part, federal laws will be applicable, and the national controversies in which it is part, whatever their nature, will be of the exclusive competition of the Federal Courts, being excepted to grant the guarantees that the legal orderings demand to the parts, still in the cases of judicial controversies”

<sup>640</sup> The text in Spanish says: “Artículo 72.- Los actos jurídicos que celebren *Petróleos Mexicanos* y sus organismos subsidiarios se regirán por las leyes federales aplicables y las controversias nacionales en que sea parte, cualquiera que sea su naturaleza, serán de la competencia de los tribunales de la Federación, salvo acuerdo arbitral, quedando exceptuados de otorgar las garantías que los ordenamientos legales exijan a las partes, aun en los casos de controversias judiciales. Tratándose de actos jurídicos de carácter internacional, *Petróleos Mexicanos* y sus organismos subsidiarios podrán convenir la aplicación de derecho extranjero, la jurisdicción de tribunales extranjeros en asuntos mercantiles y celebrar acuerdos arbitrales cuando así convenga al mejor cumplimiento de su objeto.”

<sup>641</sup> In Spanish: “Ley Federal de Entidades Paraestatales”.

... VI. To compromise cases to arbitration and to carry out transactions;...<sup>642</sup>

#### 4.3.7 International Treaties.

It is important to remember that within the Mexican domestic legislation we must consider the treaties that have been signed in this matter, which have the character of supreme law. These treaties are the following:

1. United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. (Nueva York, USA, 1958).<sup>643</sup>
2. Inter-American Convention on International Commercial Arbitration. (Panamá, Panamá, 1975).<sup>644</sup>
3. The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards. (Montevideo, Uruguay, 1979).<sup>645</sup>
4. North American Free Trade Agreement (NAFTA).<sup>646</sup>

<sup>642</sup> The text in Spanish says: “Artículo 22: Los directores generales de los organismos descentralizados, en lo tocante a su representación legal, sin perjuicio de las facultades que se les otorguen en otras leyes, ordenamientos o estatutos, estarán facultados expresamente para: ... VI. Comprometer asuntos en arbitraje y celebrar transacciones.”

<sup>643</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, it applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important.

<sup>644</sup> Modeled after the New York Convention, the 1975 Inter-American Convention on International Commercial Arbitration, called the “Panama Convention,” provides for the general enforceability of arbitration agreements and arbitral awards in the Latin American countries that are signatories to the Convention. Currently, over a dozen nations ratified the Convention, including the United States, Brazil, Mexico, Venezuela, and Argentina.

<sup>645</sup> Within the framework of the OAS, the initial effort to address matters of jurisdiction exclusively was the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Montevideo, 1979 (hereinafter, the 1979 Montevideo Convention). This Convention is a single convention, the importance of which is that it only establishes rules that address the recognition and enforcement of foreign judgments. A single convention does not include rules on direct jurisdiction, i.e., provisions that set forth specific criteria to determine or to decline jurisdiction. The provisions of the 1979 Montevideo Convention only apply when there is an existing judgment or arbitral award rendered in civil, commercial or labor proceedings in one of the signatory countries. In such cases, the Convention sets forth the requirements that must be met in order to establish the extraterritorial validity of such judgments, awards or decisions. The Convention also sets forth the procedures to recognize and enforce them. At present, the 1979 Montevideo Convention is in force in the following countries: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

<sup>646</sup> From a general point of view, a Free Trade Agreement is an agreement, between two or more countries to eliminate commercial barriers among them, which allows to increase exports, investments, jobs and salaries.

## 5. Multiple Bilateral Investment Treaties.<sup>647</sup>

### 4.3.7.1 North American Free Trade Agreement (NAFTA).

The North American Free Trade Agreement that have negotiated Mexico, Canada and the United States has increased the commercial interchange between the three countries and has caused commercial differences that require impartial instances and adapted mechanisms to resolve them. Within the mechanisms that can be used, emphasize should be done to mediation and arbitration. The types of conflicts that can be object of these mechanisms

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The 12 August 1992, the Minister of Commerce and Industrial Promotion of Mexico, Mr. Jaime Serra; the Minister of Industry, Science and Technology and International Trade of Canada, Mr. Michael Wilson; and the Commercial Representative of the United States, Ms. Cara Hills, concluded the negotiations of the North America Free Trade Agreement (NAFTA is the abbreviations in English and TLCAN in Spanish).

In the case of the trilateral treaty that Mexico, Canada and the United States have negotiated, the President of Mexico, when concluding the respective talks expressed: "The treaty is a set of rules that we, the three countries, decided to sell and purchase products and services in North America. It is called of free trade because these rules define how and when the barriers to the free movement of goods and services between the three nations will be eliminated; that is to say, how and when the permits, the quotas, the licenses and, particularly, the tariffs; which means, the taxes that are to be charged when importing goods, will be eliminated. It is also an agreement that creates the mechanisms to provide solution to the differences that always arise in the commercial relations between nations", "Message of the President Carlos Salinas de Gortari to the Nation on the occasion of the Free Treaty Agreement", Los Pinos, 12 of August of 1992, SECOFI, Documento Informativo. Essentially, the following can be indicated as objectives of the Treaty: to eliminate barriers the commerce, to promote conditions for a fair competition, to increase the investment opportunities, to provide proper protection to the intellectual property rights, to establish effective procedures for the application of the Treaty and the resolution of controversies, as well as to foment the trilateral, regional and multilateral cooperation. The Member States of the NAFTA will achieve these objectives by means of the fulfilment of the principles and rules of the Treaty, as those of the national treatment, treatment of more favoured nation and transparency in the procedures. Pamphlet Treaty published by SECOFI, and "Panorama Jurídico del Tratado de Libre Comercio", Universidad Iberoamericana, Departamento de Derecho, México, 1992.

<sup>647</sup> Major trading nations, including the United States, most of Western Europe, and Japan, have entered into bilateral investment treaties or investment protection agreements with countries in developing regions. In 2004, more than 2,000 such treaties were in effect. Generally, these treaties serve as a means of encouraging capital investments in developing markets. The typical investment treaty focuses on a scenario where an investor from one party state enters into a contract providing for an investment with the other member state. These investment treaties generally serve a number of purposes, such as ensuring that investments receive fair and equitable treatment as compared to domestic investors and investments; giving full protection and security to foreign investments; guaranteeing that investments will not be expropriated by the government except for a public interest, and even then only after adequate compensation; and other reasons, all meant to encourage further investments. Another key objective of the majority of bilateral investment treaties is to arrange for international arbitration by allowing for disputes to be submitted to arbitration pursuant to, depending on the bilateral investment treaty at issue, the arbitration rules of ICSID, the ICC Arbitration Rules or the UNCITRAL rules. As long as the bilateral investment treaty is in place, the host state essentially consents to the jurisdiction of the arbitral body, and the investor is free to bring an arbitration in any of the arbitral for a mentioned in the treaty. It is important to consider the Law for the Celebration of Treaties, published in the DOF on the 2 of January of 1992. This Law establishes the legal frame of treaties and the inter-institutional agreements. The Law looks for to guarantee a unitary foreign policy when demanding that the integration of Mexico to the new international context, takes place with order and coordination. Solana, Fernando, "Ley de Tratados", Documento de la Secretaría de Relaciones Exteriores, México, 1992.



are, among others: financial investment, commerce, construction, employment, financial services, franchises, industrial property, manufactures, petroleum, gas, etc.

Chapter XIX of the NAFTA is specifically referred to the revision and resolution of controversies out of compensatory and antidumping quotas, settling down reserves by the parties that subscribe the treaty to apply their legal dispositions in this subject matter, as well as to change them or to reform them.

In chapter XX, the institutional provisions and procedures for conflict resolution are settled down, so that, as it happens in the before mentioned chapter, the sovereign parties that subscribe the document, can establish, in a state ministry level, the Commission of Free Trade. This Commission counts on a Secretary integrated by national sections and which object is to supervise applicability of the Treaty, to watch its development, to resolve the controversies that could arise with respect to its interpretation or application, to supervise the work of all the committees and working groups, and to know any other subject that could affect the operation of the Treaty.

As for the resolution of controversies, a criterion of general character is specified, in the sense that the parties should try to reach an agreement on the interpretation and the application of the treaty, by means of the cooperation and consultations; establishing that, unless otherwise foreseen in chapter XIX in the subject matter of conflict resolution for compensatory and antidumping quotas or what was established in the own Treaty, the provisions of chapter XX will be applicable to the prevention or the solution of all the controversies that derive from the application or interpretation of the Treaty itself. A first stage for the resolution of controversies is the consultation processes and if they do not succeed, the parties will be able to ask for conciliation and mediation of the Commission of the Free Trade, within the terms that are indicated in the document. Supposing that the participation of the mentioned Commission does not bring the resolution of the case, an arbitration panel with the participation of arbitrators previously registered and who must reunite predetermined qualities, will be integrated and which will follow the model procedural rules established by the own Commission, with the possibility that in the process experts or the Scientific Revision Committees can take part of.

All what has been previously said with respect to the NAFTA has been on the resolution of conflicts amongst the state parties; it means, acting as sovereign beings. In contrast, Section “C” of this chapter XX, establishes the internal procedures and resolution of private commercial controversies,<sup>648</sup> which more outstanding points are ruled by the following article:

*“Article 2022: Alternative Dispute Resolution*

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<sup>648</sup> For the main differences between public and private arbitration see supra pp. 50

1. *Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.*
2. *To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.*
3. *A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.*
4. *The Commission shall establish an Advisory Committee on Private Commercial Disputes comprising persons with expertise or experience in the resolution of private international commercial disputes. The Committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area.”*

To this respect, we commented that Mexico has taken some advisable measures for the fulfilment of the assumed commitments, as it can be seen of the reforms already commented of the Commercial Com. and to the Civil Procedures Federal Code, as well as the adoption of the international Conventions in the subject matter. Nevertheless, our opinion is that the intervention of the Mexican government has been very little to promote arbitration and much less to promote other mechanisms of resolution of controversies as it is the mediation.

The joint work of the three Member States of this treaty has given the result of the creation of the Centre of Commercial Arbitration and Mediation for the Americas (CAMCA) which we are sure will be an indispensable institution for the evolution of the commercial relationship between the Member States of the NAFTA.

#### **4.4 Comments on the Mexican Oil & Gas and ADR Legislation.**

In the first part of this chapter we discussed the relationship of the legal rule or legal norm with the sociology of law. In the second part, a merely descriptive analysis of the legal framework applicable to the Oil & Gas industry in Mexico and the ADR industry in this country was carried out.

We believe that this descriptive analysis is totally transcendent in this research, because in order to understand the social phenomena related to these industries, we must be clear about the rules of the game, so we can reach conclusions about their proper application.

In this part of this paper, we will make some brief comments on the legal framework mentioned above. We begin with the legal framework applicable to the Oil & Gas industry. The legal regulation in this sector has suffered many changes since its beginning, during this journey we have seen a legislation that has had ups-and-downs as regards the involvement of private companies.

At the beginning, the participation of private companies was allowed, even foreigners, in activities that were subsequently exclusive to the Mexican nation. Today, after the reforms of 2008, the participation of private companies was reopened to some extent. The government, depending on the interests to follow, has acted as a “dad” that allows gradually the opening of the industry; however, we believe that there is still a long way to go.

Unlike other countries, we believe that the Oil & Gas legislation in Mexico is still too protectionist, and that it does not pursue the purpose that should, that is, being able to establish the foundation for an industry to grow and achieve a better standard of living for Mexican citizens. As mentioned above, political parties use this legislation to their benefit and to the detriment of others.

We believe that we should follow the models that have worked in other countries, as commented by Javier Estrada, who analyzes the Norwegian oil model and possible adaptations to Mexico. According to this research, the model to be followed, launched in Norway<sup>649</sup> since 1970 when oil deposits were found and when the company Phillips Petroleum Company was granted the corresponding concession, is an open model in which all can participate, using the following guidelines: (i) to have a national leadership from the beginning, it means, to respect the sovereignty. This would give certainty to the public that the government would be in command of the oil developments, (ii) to have strict safety standards.

Norway was one of the first countries in venturing to produce oil in deep water and adverse weather conditions. We must remember that Mexico is just in that stage where new oil fields are mainly located in the bottom of the Gulf of Mexico, (iii) the oil business should not erode other activities of the national economy. At that time, Norway was warning about the risk of acquiring the so-called “Dutch Disease” which is that the money easily won takes out well earned money from the economy. In other words, the concern that petrolization ended up destroying other established industries, (iv) to develop the

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<sup>649</sup> Norway has generated an industrial oil and gas cluster, consisting of 400 companies, most of them entirely devoted to the oil sector and 1,200 companies partially more focused on the sector. All the links in the production chain are covered. Thanks to this Norway reaches today the 60% of national content in the provision of products and services to its oil sector. Almost the same amount is exported with strong growth trends.

Norwegian “know how” in Oil & Gas areas. Norway decided to build capacity throughout the Oil & Gas productive chain to develop its own oil industry, including high technologies, (v) the following is an apparently contradictory concept, which is “cooperation and competition”. This means to allow foreign companies to compete for oil concessions, then forcing them to have to develop close cooperation between them. Obviously, by doing so, they will develop the national industry.<sup>650</sup>

We believe we are still far from a model like that, but also that we have begun the first steps. Law makers should bear in mind these five points when they decide to make changes to the law and applicable programs, as in the case of the National Development Plan, Sectorial Programs as in the case of the Energy Sector and institutional programs. Current legislation is quite good, but equally, we believe it can be improved as long as they have the sole purpose of growing PEMEX for the benefit of the Mexican people.

Following up with the second part of this descriptive analysis on the applicable law in the two industries that form the intersection of our research, we will make some comments on the ADR legislation in Mexico.

The legislative history of ADR in Mexico has been different. ADR are newly created. As mentioned in Chapter V of this work, prior to the negotiation and signing of the NAFTA, ADR were hardly used and neither had a sufficient legal support. There was a chapter on arbitration in the Commercial Code, but in practice it was useless. It was not used by the judges. Universities had no subject classes on ADR. And traders did not even know what it was. Thus, when the modification was made in 1989 and in 1993 the law changed radically. The change was not as slow as it happened with the oil legislation. The modifications were aimed, mainly that of 1993, to the adoption of the Model Law of the UNCITRAL which was a guarantee, due to the fact that this Model Law had already proved effectiveness in various parts of the world.

Following these changes, there have been few changes in this legislation. Recently, in January 2011 an addition was made in order to support the performance of judges in the arbitration proceedings. So, in ADR we can speak of two situations: the situation of arbitration which is strongly supported with a modern and effective legal framework, and the situation of other ADR such as mediation, which we believe, is still in diapers, both in legal culture and in law. A legislation to promote mediation and other ADR is needed, mainly to try to remove the case burden of the courts.

We believe that the direction taken by the national legislation will be towards a Latin American unification, as mentioned by Julius C. Treviño, in Latin America, international commercial arbitration is presented as a necessary resource to assist in the economic and social development of the countries in the region.<sup>651</sup> This opinion emphasizes the idea of

<sup>650</sup> Estrada Estrada, Javier, “El Modelo Petrolero Noruego y Posibles Adaptaciones para México”.

<sup>651</sup> Treviño, Julio C., “El Arbitraje Comercial Internacional: Un Recurso para América Latina”, Conferencia sustentada el 17 de noviembre de 1987 en el II Seminario Iberoamericano sobre Arbitraje Comercial

removing obstacles to Latin American arbitration legislations. Treviño continues believing that Latin America has already, in general, the necessary infrastructure to develop international commercial arbitration. The more uniformity amongst the various domestic laws is, the greater the development of international commercial arbitration.

In addition, the international level also requires some modification, as in the case of the NAFTA. In this respect we agree with Gus Van Harten, who believes that some modifications should be carried out in the investment chapter. Though these modifications do not go directly into the area of ADR, we believe that this change would be a consequence of what he proposes.<sup>652</sup>

Van Harten states that NAFTA's investment regime should be reformed in order to encourage foreign investment, while affording appropriate policy space for governments to develop and regulate their economies in a sustainable manner and ensuring equitable governance of investment disputes such that foreign investors are not privileged, procedurally or substantively, over domestic investors and citizens.

We believe that achieving this unification in Latin American legislation on ADR and related adaptations to NAFTA, both in terms of investments and ADR, will point toward a "Multilateral Legal Order" as it is said by Peter Muchlinski. According to him, through investor-state arbitration a new multilateral international investment law based on global administrative law principles is being developed.<sup>653</sup>

#### 4.5 Petróleos Mexicanos (PEMEX)



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Internacional, organizado por el Instituto Centroamericano de Derecho Arbitral en la ciudad de Guatemala, C. A., "Revista de Investigaciones Jurídicas, Escuela Libre de Derecho", Año 12, Número 12, México, 1988, p. 338. Treviño, Julio C., Op.cit. footnote No. 101, p. 329.

<sup>652</sup> Van Harten, Gus, Op.cit. footnote No. 248.

<sup>653</sup> Munchlinski, Peter, "Corporations and the Uses of Law: International Investment Arbitration as a Multilateral Legal Order", Oñati Socio-Legal Series, v. 1, n. 4 (2011) – Socio-Legal Aspects of Adjudication of International Economic Disputes, ISSN: 2079-5971, Oñati International for the Sociology of Law, Instituto de Sociología Jurídica de Oñati.

<sup>654</sup> This is the PEMEX logo, taken from: <http://www.estudioskurin.com/wp-content/uploads/2009/03/pemex.jpg>.

#### 4.5.1 The History of PEMEX.

Before PEMEX existed as the company we nowadays know, other companies were established which were the antecedents of so great company.

From the twenties, the Mexican government had tried to take part in the petroleum production and to obtain a greater control of the oil industry by means of a public institution denominated Control de Administración del Petróleo Nacional (CAPN) (Administration of the National Petroleum). This institution had the intention to carry out production and refinement operations in federal territories. Nevertheless, the results on this first attempt on the part of the government were very modest.<sup>655</sup>

A few years later, in 1934, Petróleos de México, A. C. (Petroleum of Mexico) simply known as “Petromex”, was born. This company was a mixed share-capital company and it was an association in charge of fomenting the national investment in the oil industry and substituted the CAPN.<sup>656</sup>

The main object of this new company was to regulate the internal market of petroleum and refining products; to assure the internal supplying and to capacitate Mexican personnel. Petromex counted on wells and pipe lines in “Faja de Oro”<sup>657</sup> along with a refinery and several terminal stations in Tampico. Their distributing agencies covered the sale of products in seven states of the republic and Mexico City where gasoline and other types of fuels, kerosene and lubricating oils were offered to the public. Nevertheless the lack of investment and the low production prevented definitively the consolidation and expansion of Petromex.<sup>658</sup>

A year later, the Union of Oil Workers in the Mexican Republic was constituted, which antecedents go back to 1915. This union has taken force through the years and has gotten to be one of the most powerful in the country. In the year of 1942 the first Collective Contract of Work was signed between the Union of Oil Workers of the Mexican Republic.

Thus in 1937 the government created a new organization which depended directly on the President. This organization was the Administración General del Petróleo Nacional (AGPN) (General Administration of National Petroleum) that received the property of all

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<sup>655</sup> Between 1926 and 1929 this company produced a little more than seven thousand barrels, which was a symbolic amount if it compares with the 250 million barrels that produced, in that same period, the foreign companies. Celis Salgado, Lourdes, *Op.cit.* footnote No. 343, pp. 211.

<sup>656</sup> The government decided to participate in this company with 50% of the capital and 40% of the management of the company and the rest would be open to Mexican investors. Two types of shares were issued, those of the Series “A”, subscribed by the government and those of Series “B”, by private investors. In 1936, the total capital of the company was 10,4 million pesos, of which 6,3 million corresponded to shares Series “A” and 4,1 million to shares Series “B”. Celis Salgado, Lourdes, *idem.*, pp. 323-324.

<sup>657</sup> See *supra* pp. 145 and 160.

<sup>658</sup> Nevertheless, the majority of the shares of series “B” was subscribed by three companies of the government: (i) Ferrocarriles Nacionales, Nacional Financiera y Azucar, S.A., which meant that in fact the private investment was of only the 6,29%. Celis Salgado, Lourdes, *idem.*, pp. 323-324.



the assets of Petromex and had the same intentions. Consequently, when the expropriation occurred, this company became the owner of the goods expropriated to the oil companies.<sup>659</sup>

The government decided to create two institutions, in 1938, as a result of the problems caused when trying to organize the situation that appeared after the expropriation.<sup>660</sup> *Petróleos Mexicanos (PEMEX)* (Mexican Petroleum) and *Distribuidora de Petróleos Mexicanos* (Mexican Petroleum Distributor).

The first one would be in charge of the exploration, production, refinement, and the second would be in charge of the market of the petroleum and its derivatives, as much of PEMEX as of AGPN, domestically and abroad.

The triple organization did not work very well for the oil industry of the country, since internal problems arose that the government finally resolved by adjudging to PEMEX all the handling of the industry from August of 1940.<sup>661</sup>

During the Forties, PEMEX underwent throughout a process of maturation and adaptation, in which it had to face all the problems that arose.<sup>662</sup> In this period the applicable legal frame that gave PEMEX the character of a public company and the faculties necessary to fulfil its object was defined.

During both periods of Antonio J. Bermúdez<sup>663</sup> in the Direction of PEMEX, the first steps to a vertical integration were taken.<sup>664</sup> The legal frame of the time defined PEMEX as a

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<sup>659</sup> Alvarez de la Borda, Joel Alvarez, *Op.cit.* footnote No. 415, pp. 79.

<sup>660</sup> See *supra* pp. 157.

<sup>661</sup> Lavin, José Domingo, *Op.cit.* footnote No. 348, pp. 251-252.

<sup>662</sup> Within the problems PEMEX faced there was the restriction to the Mexican petroleum exports caused by the economic blockade that the oil companies imposed to Mexico after the government expropriated their goods. Nevertheless, these measures did not affect much PEMEX since on one hand there were always buyers and on the other hand as the internal demand increased, the remaining petroleum to export was very little. Another problem was that the companies to which their goods had been expropriated, tried to prevent that the manufacturers of consumptions for the oil industry supplied PEMEX; nevertheless this did not cause much damage either, because with World War II, the United States and Mexico entered a phase of strategic cooperation. In the national scope the problems were several, (i) the increase of the demand surpassed the production levels and PEMEX had to import derived products; (ii) the policy of low prices that the government had imposed, increase the consumption and severely damage the income of PEMEX; (iii) it was necessary to make investments in the exploitation area and the extension of the capacity of refinement. To all this, the external indebtedness was one first solution. In 1944 the EXIMBANK granted to Mexico a loan of 10 million dollars so that PEMEX extended the refinery of Azcapotzalco. Alvarez de la Borda, Joel Alvarez, *Op.cit.* footnote No. 415, pp. 87.

<sup>663</sup> 1946-52 and 1952-58. Antonio J. Bermúdez was dedicated to diverse companies since very young, established a distiller to produce whiskey and was president of the Chamber of Commerce of Juárez City from 1927 to 1929, Municipal President of Juárez City from 1942 to 1943 and in 1946 he was elected Senator by Chihuahua; nevertheless he did not take position since President Miguel Alemán Valdés appointed him Chief of PEMEX, and later he was appointed Chief of the National Border Program - Programa Nacional Fronterizo (PRONAF).

company of governmental function, with no monetary objectives and which primary targets were to conserve and to take rationally advantage of the oil resources, to take care of the internal market by supplying it and exporting solely the surpluses of the production, to contribute to the public cost by means of the payment of taxes, to improve the cultural level of the oil workers, and to create collective benefits in the zones of operation.

Therefore, at this time PEMEX was dedicated to take care of the internal market in constant growth with base in the development of the production capacities and refinement.<sup>665</sup> PEMEX had inherited the four oil zones of Mexico: the Pánuco-Ebano region (San Luis Potosí and Veracruz), Faja de Oro (Tamaulipas and Veracruz), the Istmo and Poza Rica region as a new region of great potential.

As for 1958 PEMEX was already a consolidated company and in expansion process. The maturation process already taught good results, but there was still a long way to cross. The company was obvious focused to satisfy the needs of the internal market<sup>666</sup> more that those of the external market. The most serious problem that PEMEX faced at this time was the lack of own resources to fortify the growth of the industry.

From this moment PEMEX faced the great problem of the impossibility to reinvest part of its income, as it would be the healthiest thing for the company, and was forced to transmit its resources to other areas of the economy through the product commercialization with low prices and tax loads.<sup>667</sup> This, consequently brought that a significant part of the products to be distributed within the Mexican territory would be brought from abroad, to which PEMEX had to react with the request of loans with North American banks.<sup>668</sup> This situation led PEMEX to a productive crisis between the years of 1959 and 1973.<sup>669</sup>

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<sup>664</sup> In December of 1946 a new decree reformed the original corporative structure of the company establishing as main officers the Chief and the three Assistant Directors, each in charge of the production, the commercialization and administration and the legal subjects. See the structure that PEMEX had in Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 88.

<sup>665</sup> Between 1941 and 1946 PEMEX perforated 159 exploration and development wells with a success proportion of 16%. In contrast, during the period of 1947-1958, the number of perforated wells reached the number of 1621 of which 30% were successful. Alvarez de la Borda, Joel Alvarez, idem., pp. 88.

<sup>666</sup> The internal market grew of alarming way, for example in 1959 the gas consumption within the Republic was of a little more than 2 thousand 800 million m<sup>3</sup>, in 1970 the volume had increased to 12 thousand 206 million m<sup>3</sup>. On the other hand the fuel oil stopped being the product of greater consumption and its place was occupied by gasoline, the gasohol and the diesel engine. Morales, Isidro et al. "La formación de la política petrolero en México 1970-1986", el Colegio de México, 1988, pp. 148-155.

<sup>667</sup> During the Second period of the administration of Bermúdez the taxes paid by PEMEX were equivalent to little less than half of the investment of the oil industry. Morales, Isidro et al. Idem., pp. 24.

<sup>668</sup> The Mexican oil industry gave a turn after the expropriation. The Mexican government contracted a great debt to face the petroleum expropriation and it was until 1962 when the last installment of the contracted debt was covered. See "the History of Petróleos Mexicanos", at <http://www.PEMEX.com>.

<sup>669</sup> The production could not face the increase of internal consumption which had, in this period, an annual growth rate of almost 10% whereas the one of the production was only of the 4,1%, consequently PEMEX resorted to the crude import to satisfy the demand within the country. Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 112.

With the administration of Antonio Dovalí Jaime<sup>670</sup> the company began to recover the way towards the productive self-sufficiency. Up to 1971 the Mexican Petroleum Statutory law was issued, throughout which PEMEX was created, as we nowadays know it. In the decade of the seventies, an impulse to the refinement was carried out and a height in the oil industry is experienced, as a product of the discovery of diverse oil deposits.

In the decade of the 80's PEMEX had obtained great advances for the national industry and the economic development of the country. Nevertheless, in those years, a series of changes at international level, which gave the result the crease in the activities of the company, as well as a reframing of their corporative strategies, were developed.<sup>671</sup>

As we previously mentioned, in 1992 a new Statutory law of *Petróleos Mexicanos* and *Subsidiary Organisms* was issued where the basic guidelines to define PEMEX's attributions in their character of decentralized organ of the Federal Public Administration, responsible for the conduction of the national oil industry, were settled down.

This Law determines the creation of a Corporative organ and four Subsidiary Organisms, which is the organic structure under which, at the moment, PEMEX operates. These Organisms are: (i) PEMEX *Exploración y Producción* (PEP); (ii) PEMEX *Refinación* (PXR); (iii) PEMEX *Gas y Petroquímica Básica* (PGPB); (iv) PEMEX *Petroquímica* (PPQ)<sup>672</sup>.

During the months of April, May and June of 2005, PEMEX produced a daily average of three million 425 thousand barrels of crude. Of these, it exported a million 831 thousand barrels to its clients in America, Europe and the Far East. The rest was sent to the national system of refinement.

PEMEX have become the biggest company of Mexico and one of the biggest oil companies of the world, as much as in terms of assets as of their income. In 2006 PEMEX introduced to the national market the Premium gasoline Ultra Bajo Azufre (Extreme low Sulphur).

In the last years, PEMEX has continued intensifying its exploratory activity in diverse points of the country and the continental platform and has worked in the reconfiguration of the refinery Lázaro Cárdenas, the oldest of the national system of refinement, impelling the recovery of the national petrochemical industry and looking for the increase of gas production, to satisfy the demand of the domestic market and thus, to reduce the imports of this good.<sup>673</sup>

#### 4.5.2 The Company.

<sup>670</sup> He was Chief at PEMEX from 1970 to 1976.

<sup>671</sup> Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 131.

<sup>672</sup> See *infra* pp. 227.

<sup>673</sup> See "the History of *Petróleos Mexicanos*", at <http://www.PEMEX.com>.

## PEMEX Headquarters in Mexico City



Petróleos Mexicanos (PEMEX) is the decentralized public agency of the Federal Government of Mexico,<sup>675</sup> responsible to exclusively carry out, the strategic activities in the subject matter of hydrocarbons, which are reserved by the Constitution, to the Mexican State. As part of these activities, it can be mentioned the central conduction and the strategic direction of the national Oil & Gas industry, as well as to assure its integrity and unit action.<sup>676</sup>

Since 1992,<sup>677</sup> the operation of PEMEX<sup>678</sup> is carried out throughout a corporative and four subsidiary organisms, as well as by PMI International Commerce and its group of companies.

<sup>674</sup> [http://mx.images.search.yahoo.com/search/images;\\_ylt=A0geu8Xc0tdOxCKAFzTD8Qt.?ei=UTF-8&p=PEMEX%20torre%20ejecutiva&fr2=tab-web&fr=yfp-t-706-s](http://mx.images.search.yahoo.com/search/images;_ylt=A0geu8Xc0tdOxCKAFzTD8Qt.?ei=UTF-8&p=PEMEX%20torre%20ejecutiva&fr2=tab-web&fr=yfp-t-706-s)

<sup>675</sup> A decentralized public agency, according to Mexican Legislation, is an agency which is created by law or congress decree or presidential decree with own personality and own patrimony. See article 45 of the Organic Law of the Public Federal Administration.

<sup>676</sup> The Chiefs which PEMEX has had are: 1939-1938 Manuel Santillán, 1938-1940 Vicente Cortés Herrera, 1940-1946 Efraín Buenrostro Ochoa, 1946-1958 Antonio J. Bermúdez, 1958-1964 Pascual Gutiérrez Roldán, 1964-1970 Jesús Reyes Heróles, 1970-1976 Antonio Dovalí Jaime, 1976-1981 Jorge Díaz Serrano, 1981-1982 Julio Rodolfo Moctezuma Cid, 1982-1987 Mario Ramón Beteta, 1987-1994 Francisco Rojas Gutiérrez, 1994-1999 Adrián Lajous Vargas, 1999-2000 Rogelio Montemayor Seguy, 2000-2004 Raúl Muñoz Leos, 2004-2006 Luis Ramírez Corso, 2006-2009 Jesús Reyes-Heróles González-Garza, 2009- to date Juan José Suárez Coppel.

<sup>677</sup> See supra pp. 191.

The four subsidiary organisms are:

#### **4.5.2.1 PEMEX Exploration and Production (PEP).**

PEMEX Exploration and Production (PEMEX Exploración y Producción - PEP), which has the aim of the exploration and exploitation of petroleum and natural gas, as well as its transportation and storage in terminals. Its activities are focused on the south-east and northeast of the country in the Sonda of Campeche and other parts of the Gulf of Mexico. The four zones of action are: north region, south region, marine northwest region, and marine south-east region.<sup>679</sup>

#### **4.5.2.2 PEMEX Refinement (PR).**

PEMEX Refinement (PEMEX Refinación), which takes care of the industrial processes of refinement. It elaborates combustible and other derivatives of petroleum (gasoline, diesel, fuel oil, jet fuel, asphalts and lubricants). It also stores, transports, distributes and commercializes them. For the transport of combustible, it counts on pipelines, car-tanks and ship-tanks. It is also in charge of the distribution of automotive fuels to the gas stations of the Mexican territory.<sup>680</sup>

#### **4.5.2.3 PEMEX Gas and Basic Petrochemical (PGPB).**

PEMEX Gas and Basic Petrochemical (PEMEX Gas y Petroquímica Básica - PGPB), which processes the natural gas and the liquids of the natural gas. It distributes and

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<sup>678</sup> The basic legal frame to which is subject the operation of PEMEX and its subsidiary organisms is the following: Laws: Código Fiscal de la Federación; Constitución Política de los Estados Unidos Mexicanos; Ley Federal de Responsabilidades Administrativas de los Servidores Públicos; Ley General de bienes nacionales; Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público; Ley de Obras y Servicios relacionados con las mismas; Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo; Ley Orgánica de la Administración Pública Federal; Ley Federal de las Entidades Paraestatales; Ley Federal de procedimiento Administrativo; Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental; Ley General del Equilibrio Ecológico y la Protección al Ambiente; Ley Federal sobre Metrología y Normalización; Ley Federal de Derechos; Ley General para la Prevención y Gestión Integral de Residuos; Ley de Ingresos; Ley Federal de Presupuesto y Responsabilidad Hacendaria; Ley del Impuesto a los Depósitos en Efectivo; Ley de Petróleos Mexicanos; Ley para el Aprovechamiento de las Energías Renovables y el Financiamiento de la Transición Energética; Ley para el Aprovechamiento Sustentable de la Energía; Ley de la Comisión Reguladora de Energía; Ley de la Comisión Nacional de Hidrocarburos; Ley de la propiedad Industrial; Ley Minera; Código penal Federal; Código Civil Federal; Ley de Expropiación. Regulatory laws (2nd. Level): Regulatory laws of previous laws, as well as: Reglamento Interior de la Secretaría de Energía; Reglamento de Gas Natural; Reglamento de Gas licuado de Petróleo; Reglamento Interno de la Comisión Nacional de Hidrocarburos. International Treaties: Tratado de Libre Comercio de América del Norte (Capítulo X Compras del Sector Público); Decreto Promulgatorio del protocolo de Kyoto de la Convención Marco de las Naciones Unidas; Convenio Internacional para la Prevención de la Polución de las Aguas del Mar por Hidrocarburos.

<sup>679</sup> Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 149.

<sup>680</sup> Alvarez de la Borda, Joel Alvarez, idem., pp. 150.



commercializes natural gas and LP gas; and it produces and commercializes basic petrochemical products.

#### **4.5.2.4 PEMEX Petrochemical (PP).**

PEMEX Petrochemical (PEMEX Petroquímica), which carries out industrial petrochemical processes different from the basic processing of natural gas, through its work centres, namely, Camargo, La Cangrejera, Cosoleacaque, Escolín, Morelos, Pajaritos and Tula. It produces, distributes and commercializes an ample secondary petrochemical product range.

#### **4.5.2.5 PMI and The Mexican Petroleum Institute.**

The PMI Group is a set of companies that PEMEX has been setting up since the year of 1988, as part of a modernization process to conduct international operations of hydrocarbon trade. PMI and the companies of its Group have got the object to conduct commercial operations in the international market dealing with crude petroleum and derived products of petroleum.

Also, the companies of the PMI Group, depending on the functions each company has, provide specialized services, such as: administrative, financial, commercial, legal, administration of risks, chartering of ships, and market strategies.

PEMEX, jointly with its subsidiary organisms, has an excellent and substantive participation in the Oil & Gas industry, including exploration and production, crude refinement, processing of gas and basic petrochemical and of some secondary products, as well as to satisfy the Oil & Gas domestic and international demand.

The Mexican Petroleum Institute was created in 1965 as one of the great achievements of the administration in charge of Reyes Heróles, in a stage that he described as “Difficult Petroleum”. This institute arose as part of the efforts in the vertical integration of the oil industry that had the intention to develop the own scientific research and to reduce the high costs of the import of technology.<sup>681</sup>

#### **4.5.3 PEMEX Abroad.**

As mentioned before, PMI Comercio Internacional, S.A. of C.V. (PMI) is the Mexican Petroleum branch in charge of the international crude petroleum commercialization and of the rendering of services to different filial companies that are in charge of the commercialization of hydrocarbons and petrochemical products, as well as of the supervision of the investments abroad. Its mission is to increase the subsidiary value of PEMEX and its organisms through international trade.

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<sup>681</sup> Alvarez de la Borda, Joel Alvarez, idem., pp. 116.



PMI has an Administration Quality System (SAC) certificated in agreement with the Mexican Norm NMX-CC-9001-IMNC-2000 and Norm ISO 9001:2000. The base documents that describe the way PMI develops the activities of crude petroleum commercialization and service rendering, are: The Quality Handbook, the processes that are therein included; the Quality Administration Procedure; the Work Guidelines and the Commercial and Service Rendering Agreements Contracts.

These documents are complemented with other elements such as the commercial negotiation, the international practices and standards, the internal operative procedures and the contracts of services with third parties.

PMI plans the development of its activities, using the guidelines and basic premises established in the Development National Plan, in the Energy Sectorial Program, in the Energy National Strategy, in the Annual Operative Programs of PEMEX and their subsidiary organisms and in its own Annual Program, which is informed annually to the Board of Directors. The approval of new commercial policies or their modifications will have to be approved by the Board of Directors.<sup>682</sup>

In 2003 PEMEX was considered the seventh more important oil company at world-wide level. In 2008 it was located in the eleventh position. The Mexican oil company has always the intention to maximize the economic value, in a long term, of the national oil resources. For that reason, and considering the displacement it has had during the last years, it promoted in 2008 the legal reform, which has been already explained in this paper, and which allows it to continue being a fundamental factor in the development of Mexico.<sup>683</sup>

Below, there are two graphics where the place PEMEX occupied in 2003 and 2008 are shown.

#### ENERGY INTELLIGENCE 2003<sup>684</sup>

Ranking	Company	Full Name	Country
1	Saudi Aramco	Saudi Arabian Oil Company	Saudi Arabia
2	Exxon Mobil	Exxon Mobil	US

<sup>682</sup> For further information on the evolution of PEMEX in the international market, see: La Industria Petrolera en México. Una Crónica”, Tomo III, “Crisis del Crecimiento y Expansión de Petróleos Mexicanos”, 50 Aniversario, PEMEX, Arturo Alvarez, 1988, México, pp. 75.

<sup>683</sup> At the end of the administration of Raul Muñoz Leos and at the beginning of the management of Luis Ramírez Corso, the profile of the Mexican industry at international level was the following: for the volume of its proven reserves of crude (13 thousand 401 million barrels) and of natural gas (15 trillions of cubical feet), it occupied places 14 and 34 in the list of producing countries respectively. For its production (3,4 million daily barrels) it is placed in the sixth world-wide place, after Saudi Arabia (8.9), Russia (8.8), the United States (5.4), Iran (3.9) and China (3.5). PEMEX was the third producing company of crude petroleum at world-wide level after the Saudi Aramco (Saudi Arabia) and the NIOC (Iran); it is also catalogued as the ninth producing natural gas company. Their international sales occupy the eighth place with 57,9 million dollars, Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 160-161.

<sup>684</sup> The Top 100 Companies, Energy Intelligence Research, OPEC Library, 2003.

3	PVD	Petróleos de Venezuela	Venezuela
4	NIOC	National Iranian Oil Company	Iran
5	Shell	Royal Dutch/Shell	Uk & Netherlands
6	BP	British Petroleum	UK
7	PEMEX	Petróleos Mexicanos	Mexico

## ENERGY INTELLIGENCE 2008<sup>685</sup>

Ranking	Company	Full Name	Country
1	Saudi Aramco	Saudi Arabian Oil Company	Saudi Arabia
2	NIOC	National Iranian Oil Co	Iran
3	Exxon Mobil	Exxon Mobil Corp.	US
4	BP	BP plc	UK
5	PVD	Petróleos de Venezuela, SA	Venezuela
6	Shell	Royal Dutch Shell plc	UK/Netherlands
7	CNPC	China National Petroleum Company	China
8	ConocoPhillips	ConocoPhillips Co.	US
9	Chevron	Chevron Corp.	US
10	Total	Total SA	France
11	PEMEX	Petróleos Mexicanos SA	Mexico

The PMI International Group is integrated by the following companies:

### 4.5.3.1 Shareholders Companies.

PMI Holdings, B.V.<sup>686</sup> This company based in Amsterdam, Netherlands. It is a shareholders company, incorporated on 24 March 1988, with the main objective<sup>687</sup> to participate or to have an interest in other companies, to finance and to manage other business enterprises of any nature whatsoever, to take up and to make loans and to provide securities, including securities for debts, as well as anything that may be connected with or may be conducive to the foregoing.<sup>688</sup>

PMI Holdings Petróleos España, S.L.<sup>689</sup> is based in Madrid, Spain.<sup>690</sup> It is a shareholder company, first incorporated as PMI Holdings N.V. with seat in the Dutch Antilles.<sup>691</sup> This company, amongst its objectives<sup>692</sup>, are: the management and administration of representative values of own funds of resident and non-resident organizations in Spanish

<sup>685</sup> The Top 100 Companies, Energy Intelligence Research, OPEC Library, 2008.

<sup>686</sup> The Articles of Incorporation of the company can be consulted at: <http://www.pmi.com.mx>.

<sup>687</sup> See Article 2 of the Articles of Association.

<sup>688</sup> The authorized share capital of the Company amounts to two hundred thousand Dutch Guilders. It is divided into two hundred shares of one thousand Dutch Guilders each. See Article 4 of the Articles of Association.

<sup>689</sup> The Articles of Incorporation of the company can be consulted at: <http://www.pmi.com.mx>.

<sup>690</sup> The company was moved to Spain throughout the Deed No. 4,308, dated on 30 December 2005, issued by Mr. Manuel Richi Alberti, Public Notary No. 30 in Madrid, Spain.

<sup>691</sup> The company was first incorporated with the Deed issued on the 7 July 1988 by Mr. Miguel Lionel Alexander, Public Notary in Curacao and registered at the Mercantile Registry of the Commerce and Industry Chamber with No. 49012.

<sup>692</sup> See Article 2 of the Articles of Incorporation.

territory and the positioning of financial resources derived from the constituent activities of such a social object, as well as the acquisition, subscription, possession, enjoy, administration and sale of shares and participation in the assets of other companies and the rendering of advisory services in the subject matters of economic, financial, fiscal, countable and legal.<sup>693</sup>

#### 4.5.3.2 Trade Companies.

P.M.I. Comercio Internacional, S.A. de C.V. This is a mercantile company, according to the Mexican mercantile legislation, which shareholders are PEMEX, the Banco Nacional de Comercio Exterior, S.N.C. (Foreign Trade National Bank) and the Ministry of Energy.<sup>694</sup>

This company based in Mexico City, Mexico, intends, among others, the commercialization, export and import of all type of products or goods, either raw materials, natural products or products derived from an industrial process; and of specific way, the commercialization of crude petroleum and products derived from its refinement and industrialization, as well as the commercialization of petrochemical products and other liquid, solid or gaseous hydrocarbons, but excluding the commercialization of these products in national territory in those areas reserved for PEMEX.

Within its objectives, the company is able to provide, amongst others, the following services: consultancy, commission, management, agency, distribution, mediation, storage or representation. The services can have a technical, administrative, financial, legal or economic character, as long as they are related to the previous objectives.<sup>695</sup>

PMI Trading, Ltd.<sup>696</sup> This company is based in Dublin, Ireland. It is a trade company incorporated on 17 May 1991. It is a Company limited by shares.<sup>697</sup> Amongst the objectives for which the company was established we can mentioned: to carry on the business of dealers and traders in oil, raw or refined in all its forms including petroleum, petroleum products and petroleum derivatives of all types, gas (natural and processed) and manufactured in all its forms, solid and liquid fuels, coal, minerals, metals, chemicals,

<sup>693</sup> The share capital is of 4,551.80 EUROS, totally subscribed and paid, and is divided into 45,518 social participations, cumulative and indivisible, of 10 cents of EURO of nominal value each, numbered correlatively from the 1 to the 45,518. See article 5 of the Articles of Incorporation.

<sup>694</sup> The shareholders structure is as follows:

Shareholder	Minimum Capital Shares	Variable Capital Shares	Total
PEMEX	425,000	1,789,241	2,214,241
Banco Nacional de Comercio Exterior, S.N.C.	37,499		37,499
Ministry of Energy	2		2
Total:	462,501	1,789,241	2,251,742

For further information on this company see: <http://www.pmi.com.mx/onepage/public/pmi.jsp>.

<sup>695</sup> Alvarez de la Borda, Joel Alvarez, Op.cit. footnote No. 415, pp. 148.

<sup>696</sup> The Memorandum of Association and Articles of Association of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/EstatuosNuevosSeptiembre2006.pdf>.

<sup>697</sup> The share capital of the company is US\$40,000 divided into 20,000 A ordinary shares of US\$1.00, each and 20,000 B ordinary shares of US\$1.00 each. See Article 4, Preliminary Section, Share Capital subsection of the Articles of Association.

petro-chemicals products, vegetables substances, ancillary substances and by-products and all commodities, goods and articles and compositions ancillary thereto or derived therefrom.<sup>698</sup>

According to the 2008 published General Balance Sheet,<sup>699</sup> the company has got total assets for 35'723,809 thousand Mexican pesos.

PMI Norteamerica, S.A. de C.V.<sup>700</sup> This company based in Mexico City, Mexico, is a trade company incorporated on 13 January 1993. It is also a Company limited by shares.<sup>701</sup> Amongst the objectives<sup>702</sup> for which the company was established we can mentioned: The refinement of crude petroleum abroad and the commercialization of crude petroleum and products derived from its refinement and industrialization, as well as the commercialization of petrochemical products and other liquid, solid and gaseous hydrocarbons, but excluding the commercialization of those products in national territory, in those areas which are reserved for PEMEX. According to the 2007 published General Balance Sheet,<sup>703</sup> the company has got total assets for 16'983,782 thousand Mexican pesos.

PMI Marine, Ltd.<sup>704</sup> This company based in Dublin, Ireland, is a trade company with operations in Mexico<sup>705</sup>. It is a company with the objectives<sup>706</sup> to carry on the business of marine transportation of petroleum, petroleum products, and/or any other commodities, goods and articles, to engage in joint venture in the aforesaid business, or to acquire and hold shares in companies engaged in the aforesaid business.<sup>707</sup>

#### 4.5.3.3 Service Provider Companies.

<sup>698</sup> See Article 2 of the Memorandum of Association.

<sup>699</sup> See <http://www.pmi.com.mx/onepage/public/docs/EstadosTRD2008auditados.pdf>

<sup>700</sup> The articles of association of the company can be consulted at: <http://www.pmi.com.mx>

<sup>701</sup> The company was incorporated throughout the deed No. 14,205, dated on the 13 January 1993, issued by the Public Notary No. 168 of the Federal District, Mr. Alfredo Ruiz del Rio Escalante. The share capital of the company is MX\$50,000 divided into 5,000 shares of MX\$10.00, each. The stockholders structure, when incorporating the company, was as follows:

Name	No. of Shares	Nominal Value
PMI Holdings, N.V.	4,950	MX\$49,500.00
PMI Holdings, B.V.	50	MX\$500.00
Total:	5,000	MX\$50,000.00

See Clause 7 of the Transitory Clauses of the Deed of Incorporation.

<sup>702</sup> See Clause 4 of the Deed of Incorporation.

<sup>703</sup> See <http://www.pmi.com.mx/onepage/public/docs/EstadosNASA2007auditados.pdf>

<sup>704</sup> The articles of incorporation of the company were notarized throughout the Deed No. 4,082, issued on the 29 of January 1997, by Mr. Victor Rafael Aguilar Molina, Public Notary No. 174 of Mexico City. The Memorandum of Association and Articles of Association of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PMImarineLIMITED.pdf>

<sup>705</sup> On the 19 December 1996, the Ministry of Foreign Affairs in Mexico authorized PMI Marine Limited to operate in the Mexican Republic.

<sup>706</sup> See Article 2 of the Memorandum of Association.

<sup>707</sup> The share capital of the company is US\$550,000 divided into 55,000 shares of US\$10.00 each. See article 4 of the Memorandum of Association.

PMI Holdings North America, Inc.<sup>708</sup> This company based in Houston, USA, is a service provider company incorporated on 6 July 1992.<sup>709</sup> The nature of the business<sup>710</sup> of the corporation and the purposes to be conducted or promoted, according to the certificate of incorporation, are to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware and under the business Corporation Act of Texas.<sup>711</sup>

PMI Services North America, Inc.<sup>712</sup> This company based in Houston, USA, is a service provider company incorporated on 3 May 1988. The nature of the business<sup>713</sup> of the corporation and the purposes to be conducted or promoted, according to the certificate of incorporation, are to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.<sup>714</sup>

PMI Services, B.V.<sup>715</sup> This company based in Amsterdam, Netherlands, is a service provider company, incorporated on 31 March 1988 with the objectives<sup>716</sup> to render services to other companies, to establish, to participate in, to have any other interest in, to finance and to manage other business enterprises of any nature whatsoever, to take up and to make loans and to provide securities, including securities for debts of others, as well as anything that may be connected with or may be conducive to the foregoing, and furthermore to participate in, to conduct the management of and to finance other business enterprises of whatever nature.<sup>717</sup>

PMI PEMEX Internacional España, S.A.<sup>718</sup>, This company based in Madrid, Spain, is a service provider company with the objectives<sup>719</sup> of rendering economic, financial,

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<sup>708</sup> The Articles of Incorporation and Certificate of Incorporation of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PMIholdingsNORTHamerica.PDF>

<sup>709</sup> The certificate of incorporation was filed with the Secretary of State of Delaware on July 6, 1992.

<sup>710</sup> See article 3 of the Certificate of Incorporation.

<sup>711</sup> The total number of shares of all classes of stocks which the corporation will have authority to issue is 1,000, all of which will be common stock and will have a par value of \$0.01 each. The Sole incorporator was Mr. Ruth Cove. See article 4 and 5 of the Certificate of Incorporation.

<sup>712</sup> The Articles of Incorporation and Certificate of Incorporation of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PMIservicesNORTHamericaINC.pdf>

<sup>713</sup> See article 3 of the Certificate of Incorporation.

<sup>714</sup> The total number of shares of all classes of stock which the corporation shall have authority to issue is 1,000, all of which shall be common stock and shall have a par value of \$1.00 each. The Sole incorporator was Mr. Jeffrey Levoff. See article 4 and 5 of the Certificate of Incorporation.

<sup>715</sup> The Articles of Incorporation of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PMIHoldingsBV.pdf>

<sup>716</sup> See Article 2 of the Articles of Association.

<sup>717</sup> The authorized share capital of the Company amounts to two hundred thousand Dutch Guilders. It is divided into two hundred shares of one thousand Dutch Guilders each. See Article 4 of the Articles of Association.

<sup>718</sup> The company was incorporated with the Deed No. 3,428 issued on the 1 July 1988 by Mr. Luis Coronel Palma, Public Notary in Madrid. The Articles of Incorporation of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PEMEXinternacionalESP.pdf>

<sup>719</sup> See Article 4 of the Articles of Incorporation.

countable, commercial and administrative advisory services to all class of companies and entities.<sup>720</sup>

PMI PEMEX Services Europe, Ltd.<sup>721</sup> This company based in England and Wales, United Kingdom, is a service provider company with the objectives<sup>722</sup> to carry on the business of providing promotional, liaison, intelligence, consulting and other services, relating to the oil industry including the European and world market for crude oil and petrochemical oil and gas products of every kind, and to act as a representative for companies engaged in extraction, exploitation and sale of such products throughout the world and for their customers and of providing and procuring the provision of all such services in relation thereto as may be incidental or conducive to the above projects or any of them.<sup>723</sup>

#### 4.5.3.4 Other Companies.

Deer Park Refining Limited Partnership. This company based in Houston, USA, is a limited partnership company which operates as a heavy crude refining company. The company was founded in 1993 and is based in Deer Park, Texas. Deer Park Refining Limited Partnership operates as a joint venture between Shell Oil Company and P.M.I. Norteamerica, S.A. De C.V.

Repsol YPF, S.A. (originally Refineria de Petróleos de Escombreras Oil, Yacimientos Petrolíferos Fiscales Sociedad Anónima) is an integrated Spanish oil and gas company with operations in 29 countries. The bulk of its assets are located in Spain and Argentina, as a result of the 1999 takeover of Argentine energy firm YPF by the Spanish conglomerate Repsol S.A. It is now the 15th largest petroleum refining company according to the Fortune Global 500 list, employing over 40,000 people worldwide. PEMEX is a shareholder in this company.<sup>724</sup>

The structure of the Group is the following one:<sup>725</sup>

<sup>720</sup> The share capital was settled down in ten million of pesetas and was represented by ten thousand shares, with a nominal value of thousand pesetas each, correlatively numbered from the 1 to the 10,000. This share capital was distributed, at the time of the incorporation of the company, the following way:

Name	No. of Shares	Nominal Value
PMI Services, B.V.	9,998	PS\$9,998,000.00
Daniel García-Pita Peman	1	PS\$1,000.00
Iñigo Bastarache Sagües	1	PS\$1,000.00
Total:	10,000	PS\$10,000,000.00

See Clause 2 of the Deed of Incorporation.

<sup>721</sup> The Memorandum of Association and Articles of Association of the company can be consulted at: <http://www.pmi.com.mx/Contenido/docsPortal/Transparencia/PMIservicesEUROPELtd.pdf>

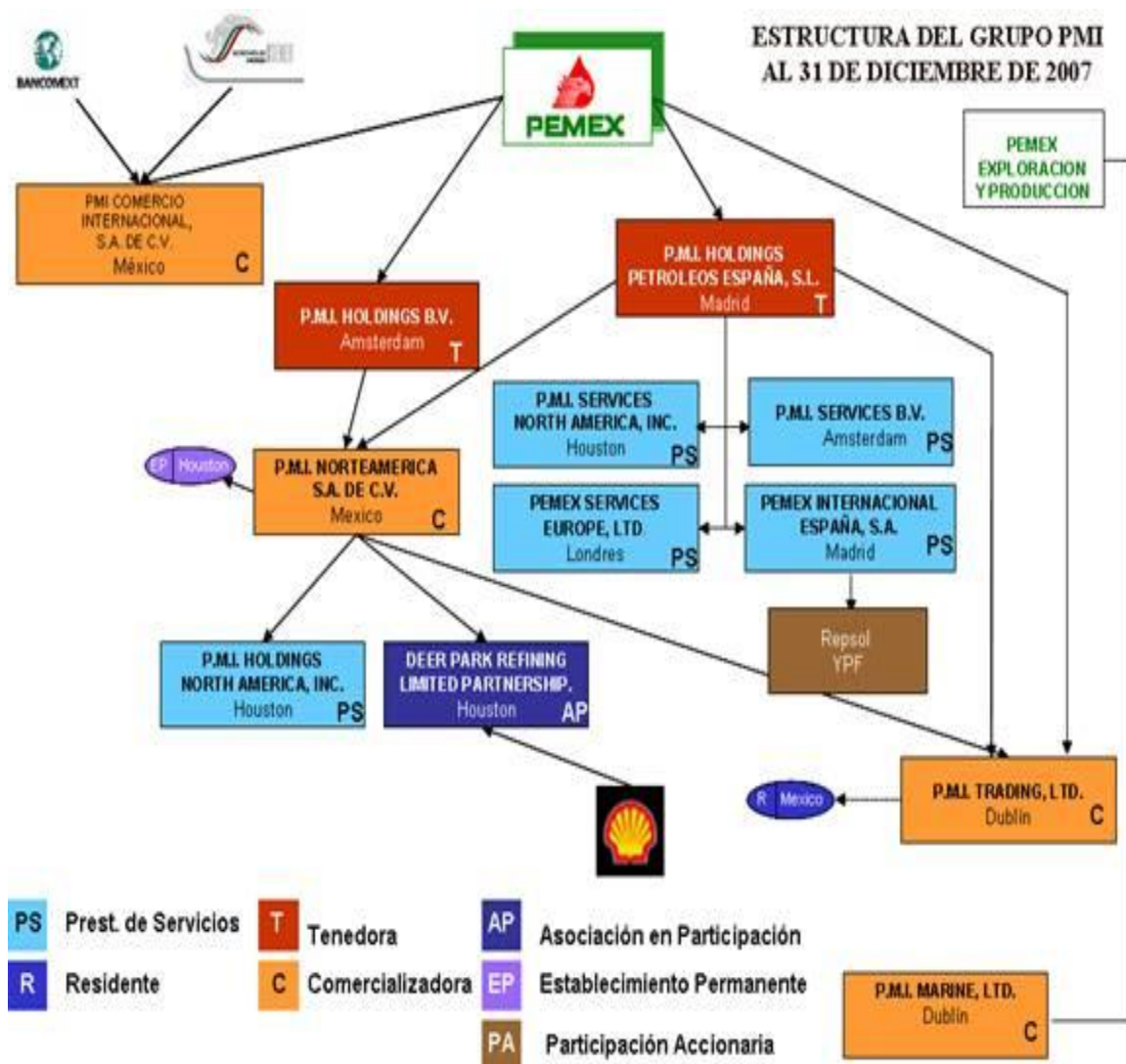
<sup>722</sup> See Article 3 of the Memorandum of Association.

<sup>723</sup> The company's share capital is £250,000 divided into 250,000 shares of £1 each. See Article 5 of the Memorandum of Association.

<sup>724</sup> Recently, there were some problems with this company as for the acquisition of more shares. See. <http://www.cnnexpansion.com/negocios/2008/09/24/PEMEX-recupera-derechos-en-repsol>

<sup>725</sup> Source: <http://www.pmi.com.mx/onepage/public/preguntasfrecuentesuno.jsp>





#### 4.5.4 PEMEX Making Contracts.

As a result of the oil reform, PEMEX has taken actions addressed to obtain a better administration of its deposits, to replace the declination of some of them with hydrocarbons of other basins, to increase the productivity and to look for improvements in its operative performance, including the necessary adjustment of the legal frame and of the structures and models of work hiring and services.

A fundamental part of the change is the adjustment of the regulatory and contractual frame in which PEMEX operates, so that, it can count on agile and updated mechanisms to operate of better way, with greater faculties in the decision making hiring process, to multiply its capacity of operation and execution and to obtain the best technologies.

In the search of modalities and adequate procedures for the hiring of goods and services and for the agile hiring of engineering, and construction of projects, PEMEX has implanted, as a result of the recent oil reform, measures to fortify its Board of Directors and new contracting models.

In the process to implant such measures, the National Supreme Court had to take part to resolve a constitutional controversy raised by the House of Representatives<sup>726</sup>, on subjects related to the application of the new Regulation of the Law of *Petróleos Mexicanos*.<sup>727</sup> In December 2010, the Supreme Court determined the legality of the dispositions of the mentioned Regulation and validated the remunerations<sup>728</sup> that PEMEX and its Subsidiary Organisms agree in the contracts they make.

The new Mexican petroleum legislation establishes, as part of the special operation regime of this company, specific provisions related to the acquisitions, renting, services and public works.<sup>729</sup> According to these provisions, the contracting related to the substantive activities of productive character, as referred to in articles 3 and 4 of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry,<sup>730</sup> as well as of the petrochemicals different from the basic one, will be ruled by the provisions issued by the Board of Directors of PEMEX.<sup>731</sup> The other activities that do not comprise of the substantive activities of productive character will be ruled by the applicable laws, depending if it is acquisitions, renting and services or of public works and related services.

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<sup>726</sup> Cámara de Diputados.

<sup>727</sup> In Spanish: “Reglamento de la Ley de *Petróleos Mexicanos*”.

<sup>728</sup> The new regulation foresees the possibility of making contracts in which reasonable cash compensations are granted to the contractors who obtain better results, either throughout the incorporation of high technology, major efficiencies and minor costs, among others factors.

<sup>729</sup> See Articles 51, 60 and Seventh Transitory, Section I of the Law of *Petróleos Mexicanos*, with relation to articles 3, 4 and 6 of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry.

<sup>730</sup> In Spanish: “Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del *Petróleo*”. “Article 3o. - The oil industry covers: I. The exploration, the exploitation, the refinement, the transport, the storage, the distribution and the sales of first hand of petroleum and the products that are obtained from its refinement; II. The exploration, the exploitation, the elaboration and the sales of first hand of gas, as well as the transport and the storage indispensable and necessary to interconnect its exploitation. Associated gas to the mineral coal deposits is excluded from the previous paragraph and the Mining Law will regulate its recovery and advantage, and III. The elaboration, the transport, the storage, the distribution and the sales of first hand of those derivatives of petroleum and gas that are susceptible to serve as basic industrial raw materials and that constitute basic petrochemical, that are next enumerated: 1. Etano; 2. Propane; 3. Butanes; 4. Pentanes; 5. Hexano; 6. Heptano; 7. Raw material for smoke black; 8. Naphtha; and 9. Methane, when it comes from hydrogen carbides, obtained from deposits located in the national territory and it is used as raw material in petrochemical industrial processes.”

“Article 4o. - The Nation will carry out the exploration and the exploitation of petroleum and the other activities that are referred in article 3o., that are considered strategic in the terms of article 28, paragraph fourth, of the Political Constitution of the Mexican United States, conducted by PEMEX and its subsidiary organisms ....”

<sup>731</sup> The Administrative Provisions on Contracting in the subject matter of Acquisitions, Renting, Works and Services of the substantives activities of productive character of PEMEX and its subsidiary organisms, were published in the official Journal of the Federation on the 6 of January of 2010.

The law foresees, as for the substantive activities of productive character, that be considered, in the corresponding public tender, minimum aspects mentioned in article 55 of the Law of *Petróleos Mexicanos*, according to the following: (i) there could be national and international tenders. In this last case, it will have to be indicated if they will be carried out in open modality or under the application of an international treaty. In the case of open international tenders, the participation of nationals of those countries with which there will be not reciprocity, can be limited; (ii) The procedure will consist of the following stages<sup>732</sup>: a) Issuance of the call; b) Issuance of the basis of the tender terms;<sup>733</sup> c) Explanation Meeting; d) Presentation and opening of proposals; e) Analysis and evaluation of the proposals<sup>734</sup>, and f) Awarding and decision, which will be known in public session.

As for the special modalities of contracting, article 60 of the Law of *Petróleos Mexicanos*, restrains the making of contracts to which are alluded by article sixth of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry. According to this article, PEMEX and its subsidiary organisms will be able to make public works agreements or rendering services agreements with individuals or companies, if so is required for the best accomplishment of its activities, with the restrictions and according to the terms of article 6 of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry. The making of these contracts will be subject to the following: (i) at any moment, the direct dominion of the Nation on hydrocarbons will be stayed; (ii) right on the oil reserves will not be granted;<sup>735</sup> (iii) at any moment, the control and the direction of the oil industry will be stayed;<sup>736</sup> (iv) The remunerations settled down in these contracts will be always in cash;<sup>737</sup> (v) It will not be granted rights of preference of any type for the acquisition of petroleum or its derivatives, or to influence in the sale to third people, and (vi) Contracts which contemplate shared production schemes or associations in the exclusive and strategic

<sup>732</sup> Stages of negotiation of prices will be able to be included, with subjection to the general rules approved by the Board of Directors of PEMEX. These rules will have to assure an impartial, honest, transparent and with the best results awarding. See subsection e), IV, article 55.

<sup>733</sup> In the basis of the tender terms, it will be included, amongst others aspects: a) The elements to prove the experience, necessary technical and financial capabilities, in accordance with the characteristics, complexity and magnitude of the goods, services or works to acquire or to contract; b) The general description of the goods, services and works, as well as the place in which both last will be carried out; c) The implementation time of contracts; d) The rules according to which the contractors or suppliers will be able to carry out sub-contracting; e) Information on the remuneration and the conditions of payment; f) The adjustment mechanisms of the remunerations; g) The requirements on the incorporation of national content in the acquisitions, services and works, respecting what it is established by international treaties in the subject matter and in accordance with the provisions that in this respect the Board of Directors emits, and h) the indication of the method for the offer evaluation. See subsection e), III, article 55

<sup>734</sup> These proposals can include mechanisms of prequalification and discounts for subsequent offers. See subsection e), II, article 55.

<sup>735</sup> Suppliers or contractors will not be able to register it as own assets and it will be always registered by the Nation as part of its patrimony. See subsection II of Article 60.

<sup>736</sup> See article 3o. of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry.

<sup>737</sup> In no case, it will be able to agree the payment for the services or for the works, a percentage of the production or the value of the sales of hydrocarbons nor of their derivatives or of the utilities of PEMEX, observing for this effect the foreseen in article 61. See subsection IV of Article 60.

areas in charged to the Nation indicated in article 3 of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry will not be subscribed.

The contracts will be able to include clauses according to which the parties are allowed to carry out modifications to the projects by the incorporation of technological advances; by the variation of prices on the market of the consumables or equipment used in works, or by the acquisition of new data obtained during the execution of the works or others that contribute the efficiency improvement of the project.

PEMEX will send to the Hydrocarbon National Commission (Comisión Nacional de Hidrocarburos), for their registry, the contracts that are inside the scope of its competition. The Commission will have to observe, at any moment, the legislation regarding the confidentiality and reserves of the information.

An aspect that has caused much controversy in the processes of modification of the applicable law is that referred to the remunerations that can be agreed. On the matter, article 61 of the Law of Petróleos Mexicanos establishes that the remunerations on work contracts and on rendering services contracts made by PEMEX and its subsidiary bodies, will have to be subject to the following conditions: (i) They will always have to be agreed in cash. To be reasonable in terms of the standards or uses of the industry and to be included in the authorized PEMEX ´ Budget and its subsidiary bodies; (ii) they will be determined through fixed schemes or predetermined formulas with which a certain price is obtained, in accordance with the civil legislation; (iii) The multiannual work contracts will be able to stipulate necessary revisions due to the incorporation of technological advances or the variation of prices on the market of the consumables or equipment used in the corresponding works or other that contribute to improve the project efficiency, with base in the mechanisms for the adjustment of costs and fixation of authorized prices by the Board of Directors; (vi) They will have to be settled down at the moment of the signature of the contract; (v) Penalties based on the negative impact of the activities of the contractor in the environmental sustainability and due to the breach of opportunity indicators, time and quality, will be included, and; (vi) Additional compensations will only be able to be included when: a) The contracting obtains economies by the shorter time of execution of the works; b) The contracting takes control or profits by new technologies provided by the contractor, or c) Other circumstances attributable to the contractor which result in a greater utility for PEMEX and in a better result of the work or service, and whenever percentage on the value of the sales or the hydrocarbon production are not committed. The possible compensations will have to be specifically settled down at the signature of the contract.

The contracts that do not observe the before mentioned provisions will be legally void.

#### **4.5.4.1 Integral EP Contracts.**

As it was previously expressed, the contracting related to the substantives activities of productive character which are referred in articles 3 and 4 of the Regulatory Law of the

Article 27 Constitutional in the Petroleum Industry as well as of the petrochemical different from the basic one, will be ruled by the provisions issued by the Board of Directors of PEMEX dated on 6 January 2011. The other activities that are not included on the substantives activities of productive character will be rules by the applicable laws, depending on acquisitions, renting and services or of public works and related services.

The Board of Directors of PEMEX approved the Administrative Provisions of Contracting, where arbitration is foreseen as the method for the resolution of controversies, as much for Integral Contracts of Exploration and Production as for other contracting considered as part of the substantives activities of productive character.

They are many and varied actions that PEMEX has been adopting to conform the regulatory frame applicable to the fundamental contracting of the Mexican oil industry. PEMEX has informed that the main projects will be developed in mature fields of the basins of south-east and North of the Mexican Republic, which contain the 29 % of hydrocarbon of the total reserves of the country.<sup>738</sup> In the area of Chicontepec, where around the 39 % of the total reserves is found, and in deep waters of the Gulf of Mexico, where we have a potential resource greater than 29 billions of barrels of crude equivalent, it means, more than the 50 % of all the prospective resources of the country.

#### **4.5.4.1.1 Identified Initial Areas.**

PEMEX, through its web-page, informed at the end of 2010 on the approval of the Integral EP Contracts (exploration and production) which intends to use immediately to document the result of public tenders related to substantives activities of productive character, for which three initial areas were already identified: (i) Magallanes, (ii) Santuario and (iii) Carrizo, with an approximated total surface of 312 km<sup>2</sup>s, a total reserve of 207 mmbpce and a present production of 14 mbd.

Given to the characteristics and opportunities that this project presents, PEMEX has agreed to initiate the implementation of the first Integral EP Contracts in these three mature filed areas. The tender call was published in the Official Journal of the Federation by PEMEX Exploration and Production, in the month of February 2011.

From 18 October 2011 the first Integral Contracts for Exploration and Production of mature fields in the South zone were signed, which include a surface of 312 squared kilometres with a reserve of 207 billions of equivalent crude petroleum barrels. The winning companies were Petrofac Facilities Management Limited for the fields Santuario and

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<sup>738</sup> In the South Region they have been identified around 40 mature fields with 420 mmbpce (million barrels petroleum equivalent crude) that can be grouped in eight areas with suitable materiality. The fields were characterized considering years of production, contribution to the annual production, maturity level and peak of production. Within one First Round referred to the fields located in the South Region, it was considered the profitability after taxes, reserves and resources, infrastructure and locations to perforate. Of those eight areas, from November of 2009, the first three have been documented; the study of other areas initiated in March of 2010.



Magallanes, besides Administradora de Proyectos de Campo for the field Carrizo. The next tenders under this same scheme are for mature fields of the North region, Chicontepec and deep waters.<sup>739</sup>

#### **4.5.4.1.2 Terms and Specifications.**

PEMEX has announced the reach of its projects in these areas, and the content of the contract, through a document denominated: “Terms and Specifications” of technical, economic, environmental, social and legal aspects, which are fundamental for the making of a services contract for the evaluation, development and production of hydrocarbon. It has also published the generic contract model.<sup>740</sup>

The design and structuring of these model contracts are the result of the effort of a specialized team of PEMEX and of the Mexican government, with the support of consultants recognized in an international level. When drafting the model, the intention to increase the capacity of execution of PEMEX has been indicated. It was established a profitable and competitive scheme that starts from the fundamental premises that they guarantee a positive cash flow for PEMEX Exploration and Production (PEP) after taxes and determine the application of payment mechanisms that stimulate saving and productivity.

In these contracting instruments, which will be awarded by means of public tenders, the participation of PEMEX in the contract is anticipated in order to incorporate and to take advantage of the transference of technologies and better practices. So that, the direct interaction with the contractor will allow PEMEX to profit from such knowledge in short terms. Its participation will be defined from the basis with an economic interest of 10% of the investment and the right to 10% of the utility, and in no case this participation will imply the creation of a public company.

Some aspects mentioned in the information published by PEMEX on Terms and Conditions, are important, as it is that the object of the contracts will be to provide the services for the evaluation, the development and the production of hydrocarbon accumulations in the area determined in the Contract, considering that all the services and the necessary resources will be provided by the Contractor and supervised by PEMEX, acting both to conduct combined-arms operations, according to the Grouping Agreement that they subscribe to the effect.

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<sup>739</sup> <http://www.eluniversal.com.mx/noticias.html>

<sup>740</sup> On 15 October 2010, the Committee of Acquisitions, Renting and Works and Services of PEMEX-Exploration and Production (PEP) considered favorably the contracts. Later, on 19 October 2010, the Board of Directors of PEP approved the services contracts. The Committee of PEMEX also considered favorably the contracts in the session of 29 October 2010 and on 24 November 2010 the Board of Directors of PEMEX approved the contracts.



Besides foreseeing the corresponding remuneration in the Contract for the rendering of the services, it will have clauses that foresee arbitration and other mechanisms for the resolution of controversies, which will be carried out in Spanish language, establishing Mexico City as the venue of the arbitration. In order to resolve technical differences and other subjects related to the Contract, it will be possible to agree on the opinion of an independent expert.

#### **4.5.4.1.3 Generic Contract Model.**

PEMEX has made a generic contract model,<sup>741</sup> which will be applied considering the Terms and Specifications of environmental, economic, social and legal character that correspond to determined area, according to the parameters that are defined in the respective basis of the tender terms.

The object of the Contract is the rendering of all the Services for the evaluation, development and production of Hydrocarbon within the Contractual Area, in accordance with the Applicable Laws, the experience and prudent practices of the Industry and the terms and conditions of the Contract.

The Contractor will be the only responsible and will cover all the expenses to provide all the necessary personnel, technology, materials and financing for the rendering of the Services, and PEP will maintain the control and decision power on the Services according to the terms of the Contract. The Contract does not confer Contractor any right to carry out, by itself, services or other oil operations in the Contractual Area, reason why, under no circumstance, it will be understood that the Contract confers the Contractor a property right on the Hydrocarbon deposits, which are property of Mexico and thus they will remain at any moment.

Also, this Contract does not confer the Contractor, under no circumstance, property rights on, neither right to participate in, the produced hydrocarbons nor of the product of its sale, which will be and remain property of PEP. Also, in no case, other existing mineral resources in the Contractual Area (either discovered or not by the Contractor) will be property of the Contractor, who will not have right to exploit, to use or to take advantage of these mineral resources in any way. Mexico will register the hydrocarbon reserves contained in the Contractual Area as part of its patrimony in terms of the Regulatory Law of the Article 27 Constitutional in the Petroleum Industry and of its regulation, reason why the Contractor will not be able to register them as assets of his property in his financial statements.

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<sup>741</sup> Source: PEMEX-Exploration and Producción. PEP displayed a generic contract model, under the consideration that, to apply it, the specific characteristics of each one of the executive documents of terms and specifications will be due to take into account, economic, environmental, social and legal fundamental of the contract corresponding to the area to which will be applied.

The model Contract considers that the term of the agreement will be divided in a period of evaluation and a period of development. Thus, in its beginning it foresees one first stage that includes activities related to technological tests and analysis of the area that includes works related to seismic matters, evaluations and perforation of exploratory well in order to identify the potential of the selected area. During the phase of development, some works are carried out that allow the construction of necessary infrastructure, activities that can last from three to seven years. Later, within the phase of secondary production or recovery improved, considering the nature of the deposit, systems for production or for abandonment of facilities are applied.

These Integral EP Contracts have advantages over those traditionally used, which are those of public work, because in these last ones remunerations are only possible to be established through raised price, unitary price, mixed prices and of programmed amortization. Whereas in the integrals, the remunerations could be established considering the needs of each project, by means of fixed schemes or predetermined formulas by which a certain price is obtained, which allows incentives to the performance, defined as stimulation that is agreed to in the contracts with the purpose to recognize, through an additional compensation to payment, the best performance of the contractors.

On the other hand, the public work contracts only allow the application of conventional penalties to the contractors for the simple delay in the execution of works. In the Integral EP Contracts for exploration and production services, conventional penalties can be agreed based on the negative impact of the activities of the contractor in the subject matter of environmental viability, and for the breach of time, opportunity and quality indicators.

The public work contracts are per determined time. The integral contracts for exploration and production services allow the flexibility in their duration, according to the needs and taking care of the particularities of each specific service. The content of the contract, besides the object, terms, participant companies and definition of the scope of the services of evaluation and development with respect to a determined contractual area, contain clauses referred to the programs of work, nomination and measurement of hydrocarbons, rights and obligations of the parties, remuneration, guarantees, responsibilities, insurances, rescission, completion and settlement, among others.

#### **4.5.4.1.3.1 Dispute Settlement.**

In addition, within the questions regarding the applicable laws and the solution of controversies, diverse sections are included. We want to mention the different steps this kind of contracts foreseen since they are the usual steps in PEMEX to resolve a dispute.

##### **4.5.4.1.3.1.1 Direct Consultations.**

Direct consultations. The Parties decide that in the event any controversy arises, they will try to resolve it through a mechanism of direct consultations, with the intention of trying to reach a negotiated agreement between the Parties.

#### **4.5.4.1.3.1.2 Independent Expert.**

Independent expert. In case the Parties do not reach an agreement with respect to their differences in technical or operational matters or related to questions of accounting, taxes and calculation of payable payments according to the Contract, the Parties will be able to decide to subject such a disagreement to the decisions of an Independent Expert. In the Contract the procedure for his/her designation, the rules as for the terms and payment of costs, is foreseen, as well as the way to successfully obtain information and to issue the corresponding resolution.

#### **4.5.4.1.3.1.3 Arbitration.**

It is finally foreseen, the possibility of being subject to arbitration. The following is the model clause it is usually used:

“Any dispute or demand that arises in relation to the Contract that could have not been surpassed by any of the controversy resolution mechanisms foreseen in the Contract, including legal questions related to the designation of the Independent Expert or with the decisions that he/she renders, shall be exclusively resolved throughout arbitration in accordance with the Arbitration rules of the International Chamber of Commerce. The applicable law to the merits shall be the stipulated in Clause 25.1. The arbitral tribunal shall be integrated by three members, one appointed by PEP, other appointed by the Contractor, and the third – who shall be president – shall be appointed in accordance with the Rules of the International Chamber of Commerce. The arbitration shall be conducted in Spanish. The arbitral procedure shall have venue in Mexico City”

As it is observed, this it is an arbitration clause in which institutional arbitration is agreed, administered by the ICC, which it will be resolved by an arbitration panel integrated by three members, lead in Spanish language and with venue in Mexico City.

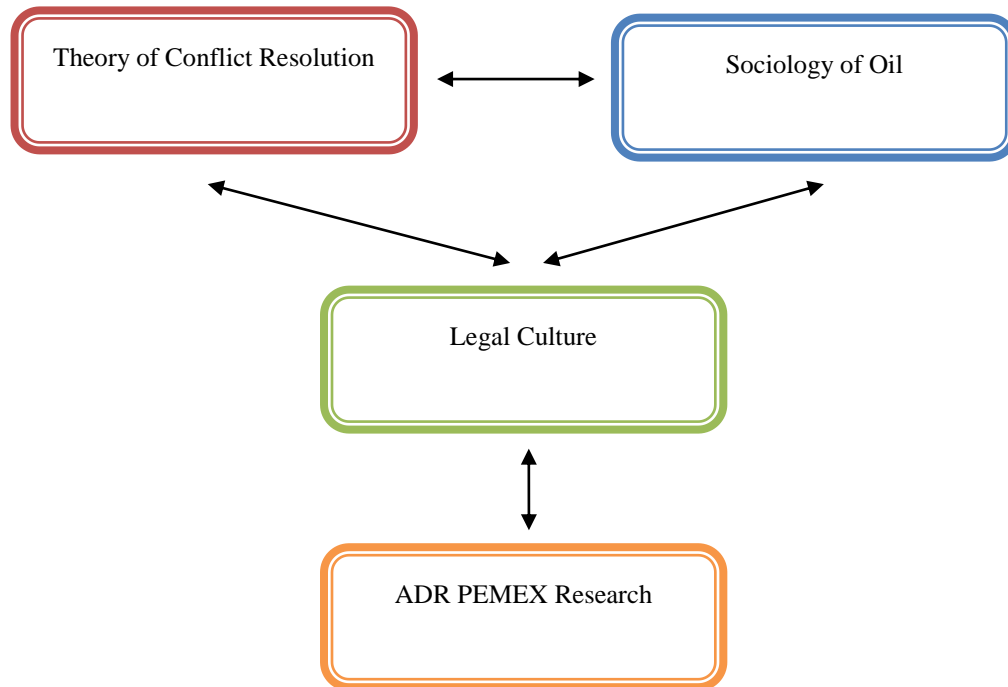
## **CHAPTER V**

### **ADR PEMEX Experience.**

*“Connecting the dots”*  
*Steve Jobs*

**5.10. Social Legal Concepts Applicable to the Research.**

This chapter is closely related to Chapter III, since it contains the development of social legal concepts basis of this research. The three related concepts are: (i) Theory of Conflict Resolution, (ii) Sociology of Oil, and (iii) Legal Culture. In order to illustrate the application of these concepts, we created this diagram which, from our point of view, provides social legal support to our research.



Our understanding is that the Theory of Conflict Resolution jointly with the concept of the Sociology of Oil influence, in a large extent, the Legal Culture of a society that exists on a particular topic, in this case, ADR in Oil & Gas. In other words, the ADR legal culture in PEMEX can be assessed by understanding the history of the Mexican Oil & Gas industry, and its influence to the Mexican Oil & Gas Industry (sociology of oil) as well as the position that PEMEX has had before the different theories of conflict resolution and ADR.

With the aim of providing an explanation to the above mentioned diagram, we recall briefly the three related concepts, starting this time by which, in our view, reflects the union of the other two, it means Legal Culture.

Culture, as mentioned by Horacio Grigera Naón, is a complex of typical behaviour and standardized social forms peculiar to a specific social group.<sup>742</sup> This concept can be taken to more specific areas such as legal culture and even more to ADR legal culture, subject matter of this research.

As commented by Reza Banakar and Max Travers, legal culture links together a number of multifaceted concepts, some of macro character, such as culture, law, institutions, and some of micro quality, such as perception, attitude and behaviour.<sup>743</sup> In this sense, in order to analyze the ADR legal culture, one should study the behaviour that, according to law, is developed by a certain group in society, in this case, the group formed by those participants in arbitrations where PEMEX has been a party. In other words, arbitrators, party lawyers, technicians, PEMEX officials, government officials who somehow determine the application and the future of these procedures, among others. They were the target of our qualitative research.

Now, moving on some concepts which were elaborated in the Conflict Resolution theories, we should remember that conflict resolution is a function that in modern times belongs mainly to the state, which is sometimes delegated to individuals as in the case of arbitrators or mediators, and that is the mechanism established by law to organize society and consequently live in peace.<sup>744</sup> The application of these ADR in a group of society is closely related to the concept of Legal Culture, as it adapts to the legislation and the needs of a group of people in a certain territory and at a certain time. In this case, PEMEX in the last decade.

Finally, the discoveries made by sociology of law can shed some light on the Oil & Gas legal culture. In this particular case, in PEMEX as the main actor in the Mexican oil industry. The research object of Sociology of Oil is, recalling what has been mentioned in Chapter III, the relationship between the discovery of Oil and Gas in certain parts of the world and the consequence of its large and obvious economic advantages and social change brought by these discoveries. In other words, the social impact of Oil & Gas in countries where a new, powerful and alien industry was born.<sup>745</sup> Hence, the importance and relevance of knowing the history of the oil industry in Mexico and the history and development of PEMEX, as the entity responsible for developing the oil industry, as well as the political, economic and social effects that this country has experienced.

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<sup>742</sup> See supra pp. 167.

<sup>743</sup> Banakar, Reza and Travers, Max, "Theory and Method in Socio-Legal Research", Banakar, Reza and Travers, Max, "Studying Legal Culture", the Oñati international Institute for the Sociology of Law, Hart Publishing, Oxford and Portland Oregon, 2005, p. 239.

<sup>744</sup> See supra pp. 93.

<sup>745</sup> See supra pp. 122.



### 5.11. Applying the Concept of ADR Legal Culture.

Having explained that our research was focused on the concept of Legal Culture, we clarify that our research was guided by the work carried out by David Nelken<sup>746</sup> and Marina Kurkchian,<sup>747</sup> who illustrate some of complexities involved in using legal culture as the basis for doing socio-legal research. Nelken's study uses the concept of legal culture to compare various legal systems and practices. In that sense, it addresses much of the concerns of comparative law from sociological and anthropological perspectives. Kurkchian's study also uses the concept of legal culture, but not so much to compare two legal systems or to make sense of foreign legal tradition, but to capture legal change and social transformation in post-Soviet Russia. Both of these studies use the notion of legal culture in a comparative manner, yet they seek different ends.<sup>748</sup>

Legal Culture is not necessarily uniform across different branches of law.<sup>749</sup> Comparative methodology should not be limited. This is shown by Nelken's and Kurkchian's studies getting the conclusion that all social scientific research is, on one form or another, comparative.<sup>750</sup> Therefore, our research has been considered a comparative analysis between the situation PEMEX faced a few decades ago where conflicts could not be resolved by arbitration at all, and the situation that PEMEX faces now where not only is able to resolve conflicts by using arbitration and mediation procedures, but also when an updated and modern legislation is applicable, as well as an increase, although not enough, of this mechanisms have been used by such an entity.

Our research has got some nuances of Nelken's work, who compared different legal systems, often separated by different culture, customs and languages. Ours, at some level, makes a comparative analysis with the legal culture of the counterparties in arbitral procedures, where they come from a different country, belonging to a different legal system and even with a different language. However, the core part of our research is focused more

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<sup>746</sup> Banakar, Reza and Travers, Max, "Theory and Method in Socio-Legal Research", Nelken, David, "Doing Research into Comparative Criminal Justice", the Oñati international Institute for the Sociology of Law, Hart Publishing, Oxford and Portland Oregon, 2005, pp. 245 – 258.

<sup>747</sup> Banakar, Reza and Travers, Max, "Theory and Method in Socio-Legal Research", Kurkchian, Marina, "Researching Legal Culture in Russia: From Asking the Question to Gathering the Evidence", the Oñati international Institute for the Sociology of Law, Hart Publishing, Oxford and Portland Oregon, 2005, pp. 259 – 277.

<sup>748</sup> Banakar, Reza and Travers, Max, Op.cit, footnote No. 743, pp. 239 – 243.

<sup>749</sup> Nelken, David, "Three Problems in Employing the Concept of Legal Culture", Published in F. Bruinsma and D. Nelken eds. Exploring Legal Culture, special issue of *Recht der Werkelijkheid*, 2007.

<sup>750</sup> Banakar and Travers considers that all forms of sociology become comparative as soon as they take the step from being purely descriptive into the domain of explanation, which requires accounting for and juxtaposing facts. They also consider that social scientists employ comparative methods because comparing and contrasting variables, cases or larger units of study, such as social institutions, cultures or legal systems, increase their understanding of social life. Legal scholars, on the other hand, investigate the causes of similarities and differences between national legal systems, to answer questions ranging from policy issues. Banakar, Reza and Travers, Max, Op.cit, footnote No. 743, p. 240.

on Kurkchiyan's research lines, who uses a local traditional legal culture as a yardstick to examine the transitional changes and the current status a domestic law in a local society.

As Kurkchiyan did, our research approach is essentially qualitative, by conducting mostly open and less structured interviews and to "measure legal culture" we use hypothesis. We recorded people's perception on ADR, and on the law and highlighted the obstacles who represent a barrier to the adequate use of ADR in PEMEX. Kurkchiyan's approach illustrates that the concept of legal culture can also be successfully employed to conduct studies of socio-legal change and transformation. As it is the case of our research.<sup>751</sup>

### **5.12. The Research.**

By doing our interviews, we wanted to record what people said when they told us what they thought of the law, and also what they said indirectly about it, while describing their own or other people's dealing with it. We also observed directly how people handled matters relating to law.

As agreed with other authors, measuring legal culture is not easy. Our idea was to measure the transition Mexico has had during the last 20 years as for ADR. A transition that came from almost a null use of ADR to a point where Mexico has had a significant participation in this game. In other words, a social legal change that started 20 years ago in the field of resolving disputes in the Mexican Oil & Gas industry. We can catalogue it as: a shift to a new legal culture.

This change has been a consequence of the globalization the Oil & Gas Mexican industry has experienced, as all the industries in this country. In order to understand this change and the situation we are analyzing nowadays, we need to see farther back in history. That is why a brief history of the Oil & Gas industry in Mexico as well as a PEMEX history is told in previous chapters of this document. Particularly since we consider that the expropriation stage of the most important oil & Gas company in Mexico has its origin in an arbitration decision 70 years ago.

We chose to concentrate our scrutiny on a social-legal group which consisted of active participants in the ADR Oil & Gas Industry, namely arbitrators, lawyers, PEMEX officials and ADR Oil & Gas experts.

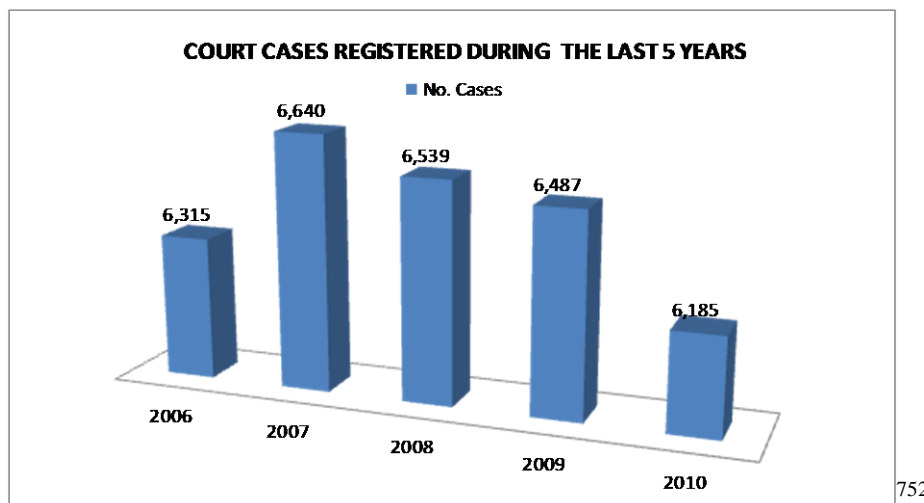
Our research was directed at what is happening in practice in the ADR Oil & Gas industry. Why there have not been mediation cases at all in PEMEX?, why there have been so few arbitration cases in PEMEX?, why those cases have been so time consuming?, why there is the impression that arbitration is not functional for Oil & Gas conflicts?, how do people involved in these procedures perceive such methods?, amongst others questions.

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<sup>751</sup> Banakar, Reza and Travers, Max, *idem.*, p. 243.

### 5.13. PEMEX Statistics (Quantitative Results).

The following statistics reflect the court trial numbers in PEMEX. These court procedures, although referring to processes ventilated before state courts, help us to give us a much clearer idea of the status of the arbitrations and mediations in PEMEX. Since making a comparative analysis, we will be able to conclude the low use of arbitration and no use of mediations. We believe it is important to include this quantitative information in this research since it will also indicate the field in which ADR may have a future presence.



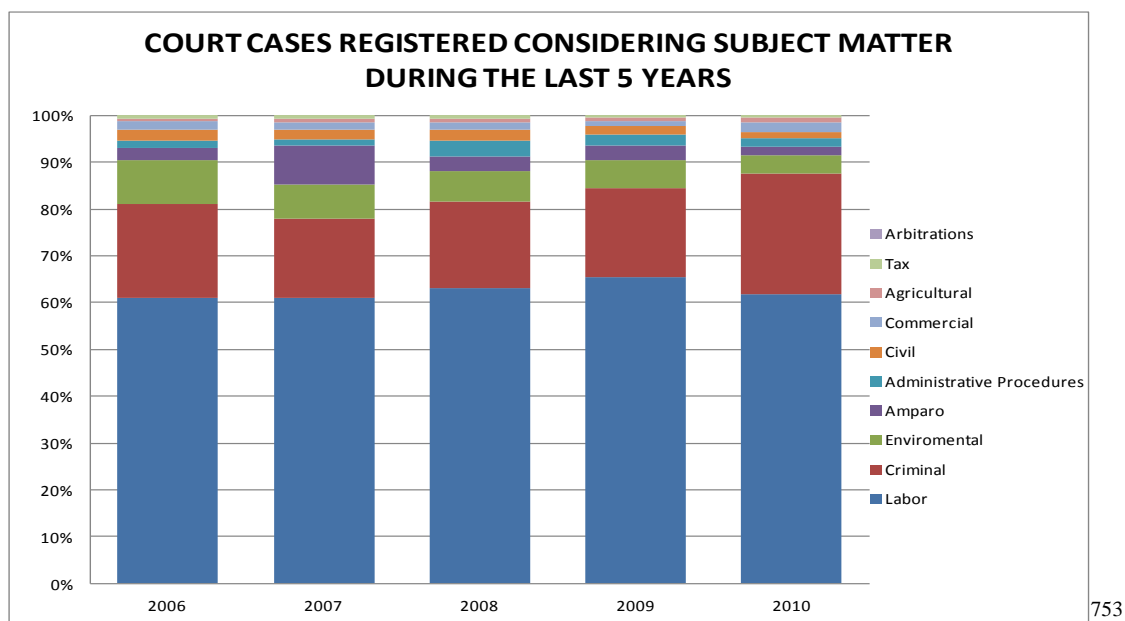
Out of this graphic we can realize there is an average amount of 6,000 living cases in PEMEX. Some of these cases are considered arbitrable some are not. In comparison to 11 arbitration cases there have been in PEMEX. We can conclude the extremely low rate in the use of arbitration in this institution.

Below there is the statistic as for the living court cases in PEMEX considering their subject matter. It is important to mention that only those belonging to arbitrable matters are susceptible to be resolved via arbitration and mediation.

COURT CASES REGISTERED CONSIDERING SUBJECT MATTER DURING THE LAST 5 YEARS											
Year	Labor	Criminal	Enviromental	Amparo	Administrative Procedures	Civil	Commercial	Agricultural	Tax	Arbitrations	Others
2006	3,856	1,257	595	162	100	154	122	25	43	1	0
2007	4,061	1,116	487	545	92	145	102	52	40	0	0
2008	4,125	1,204	428	202	232	148	98	60	41	1	0
2009	4,243	1,238	393	200	146	120	76	48	22	1	0
2010	3,820	1,597	242	109	118	86	115	74	23	0	0
TOTAL	20,105	6,412	2,145	1,218	688	653	513	259	169	3	

<sup>752</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

The table below has got the same information as the previous one but this time considering percentages, which allow us to have a better understanding of the situation:

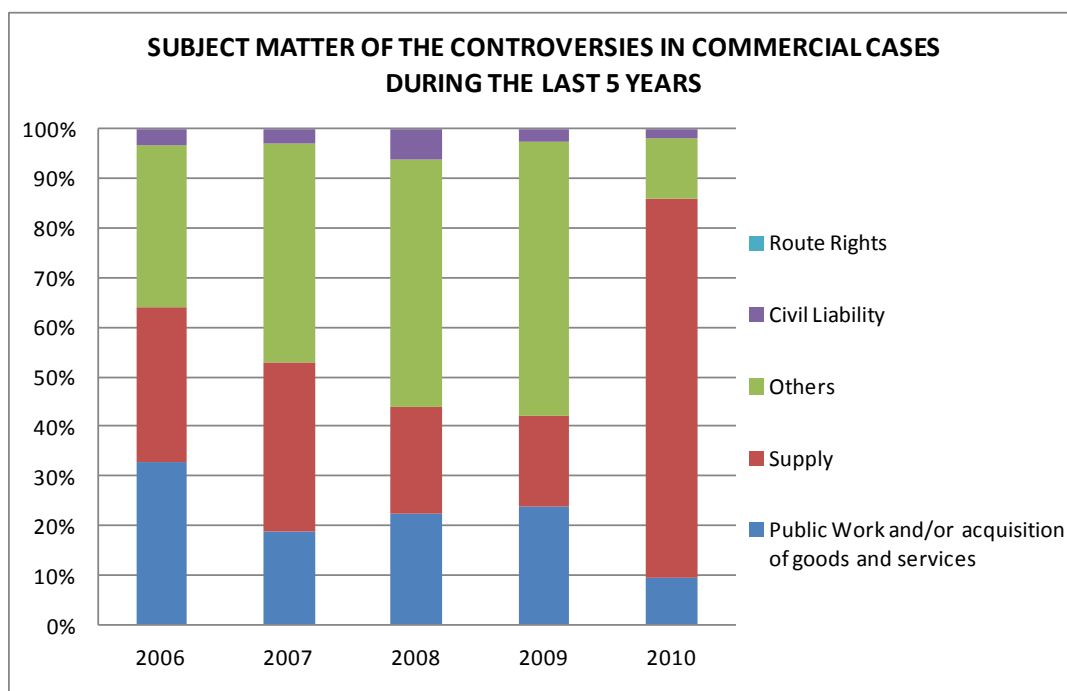


Most of the arbitrable cases are the commercial ones. Below there is another graphic that shows the number of commercial living cases before national courts, specifying the nature of the conflict. The first column, public work and/or acquisition of goods and services, are the main target for arbitration and mediation, as well as the supply relationships.

SUBJECT MATTER OF THE CONTROVERSIES IN COMMERCIAL CASES DURING THE LAST 5 YEARS					
Year	Public Work and/or acquisition of goods and services	Supply	Others	Civil Liability	Route Rights
2006	40	38	40	4	0
2007	19	35	45	3	0
2008	22	21	49	6	0
2009	18	14	42	2	0
2010	11	88	14	2	0
Total	110	196	190	17	

As it was done before, the table below shows the same information as the previous one but this time considering percentages, which allow us to have a better understanding of the situation:

<sup>753</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

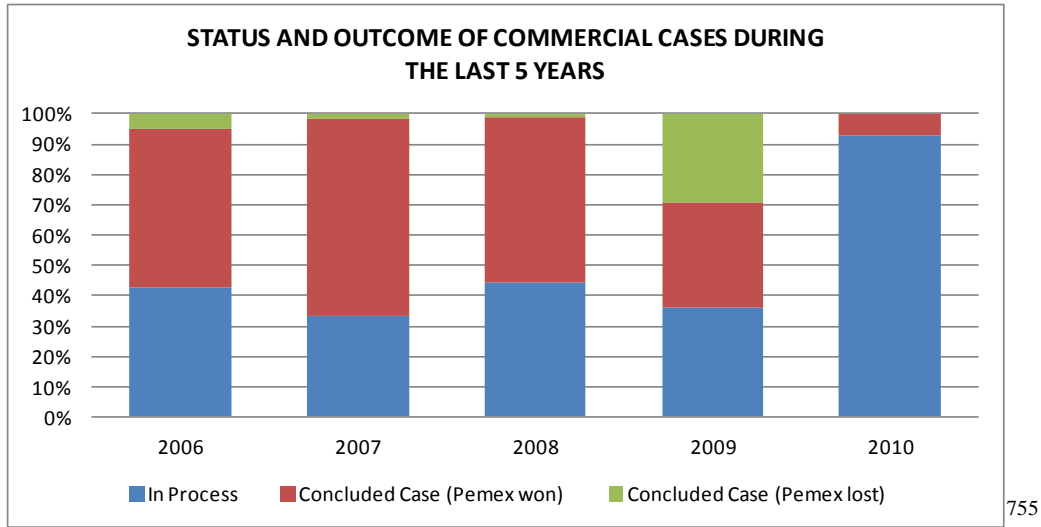


Finally, below is the statistic on those commercial processes which are in process or already concluded, as well as the aim of the judgment.

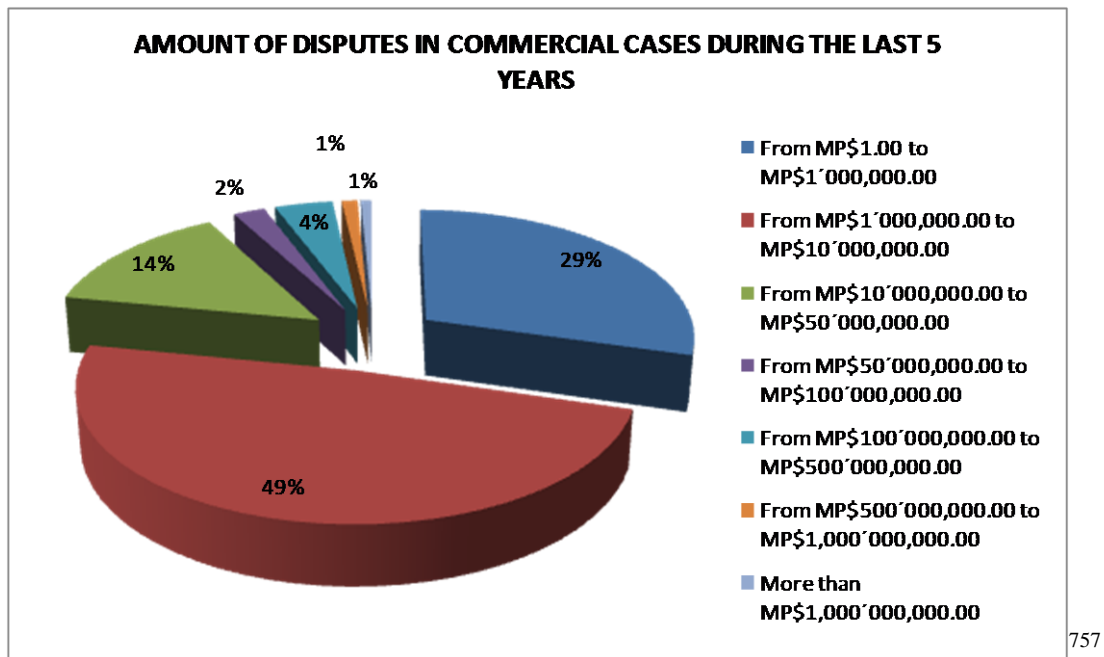
STATUS AND OUTCOME OF COMMERCIAL CASES DURING THE LAST 5 YEARS			
Year	In Process	Concluded Case (PEMEX won)	Concluded Case (PEMEX lost)
2006	53	65	6
2007	34	66	2
2008	44	54	1
2009	38	37	31
2010	107	8	0
TOTAL:	276	230	40

Once again, the table below has got the same information as the previous one but this time considering percentages, which allow us to have a better understanding of the situation:

<sup>754</sup> The source of this chart was the information gathered while doing the field research in PEMEX.



As for the amount of the disputes, below there is a graphic with different ranges of amounts showing the cases from MP\$1.00 to MP\$1,000'000,000.00 (which is around USD\$75'773,074.00).<sup>756</sup>



As a mere statistical information, and as a result of the information obtained in an interview with a senior official in CFE (the Electricity Federal Commission), manager of court proceedings, he mentioned that in this institution, the second in importance in the energy industry in Mexico, and among the most important in Latin America, there have been

<sup>755</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

<sup>756</sup> According to the exchange rate published by the Bank of Mexico, on the 27 October 2011.

<sup>757</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

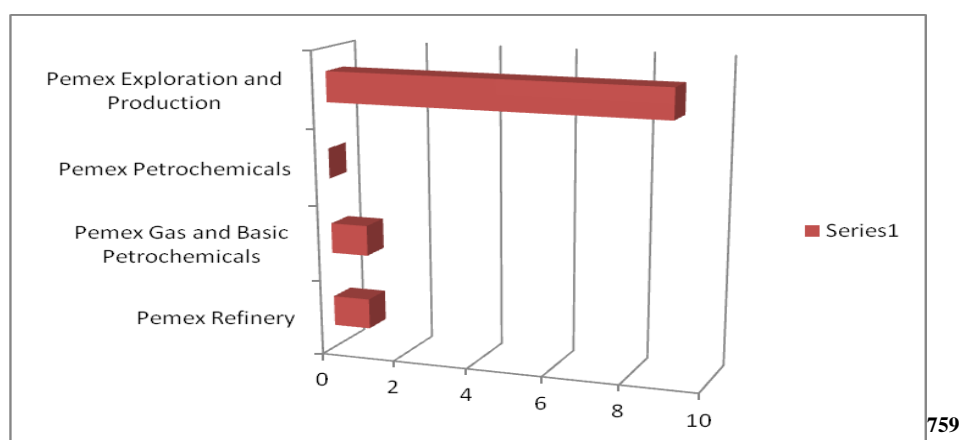


around 14 or 15 arbitration proceedings since 2001. There was a moment where 8 arbitration cases were in process at the same time.<sup>758</sup> This also shows the low rate of arbitrations in the second most important institution in the energy industry in Mexico.

#### 5.14. PEMEX Arbitrations.

Up to this moment, there have been few arbitration proceedings in which PEMEX has participated, even more if one considers the number of litigation cases alive in such a company. The legal relations that have led to conflicts are mainly those relating to public works and the development of large projects such as refineries, oil platforms and marine pipelines. Below there is a summary of the arbitration procedures in which PEMEX has participated, either as plaintiff or defendant:

**Arbitration Cases Registered at PEMEX**



##### 5.14.1. PEMEX Refinación Arbitrations.

###### 5.14.1.1. Petróleos Mexicanos and PEMEX Refinación vs. CONPROCA.

CONPROCA was a consortium formed by two companies: Siemens, a German company, and a Korean company. Both companies are leaders in the Oil & Gas international market.

<sup>758</sup> *¿Y ha sido constante, digamos el inicio de procedimientos de arbitraje? No, ¡¡ ó hubo como un bum y después como que!!*, de pronto hubo como un bum, solamente hay arbitrajes y a lo mejor me adelanto a algunas preguntas, *¡¡sí, no hay problema eh!!*, solamente hay dos escenarios donde se contemplan los arbitrajes, principalmente, uno con los productores externos de gas y dos en los contratos de piridegas, *¡¡ok!!*, o en las obras, en las grandes obras, en las construcciones como la presa del carbón, la Yesca, son los únicos escenarios donde se establece el arbitraje, en las controversias de gas ha habido, es común, son temas prácticamente de interpretación de contratos, *¡¡ok!!*, o cumplimiento de contrato en materias de obras, en el cajón pasivo hubo una controversia respecto al pago, respecto al cumplimiento de contratos que está por resolverse *¡¡ok!!*, pero si aproximadamente ese es el número de arbitrajes que ha habido, *¡¡perfecto!!*

<sup>759</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

On 5 September 1996, PEMEX issued the call for the International Public Tender No. PR-SP-050996 for the modernization and expansion of the refinery “Hector R. Sossa Lara” in the town of Cadereyta de Jimenez, in the State of Nuevo Leon in Mexico. This project involved the installation of new plants, expansion and/or modernization of existing plants and expansion of auxiliary services and integration of the refinery, as well as the development of infrastructure including terminals and pipelines to increase the supply of crude oil and distribution and marketing of products related to the refinery. It was anticipated that the contract also involved the financing of works.<sup>760</sup>

### Refinery of Cadereyta



761

After winning the tender, on 26 November 1997, PEMEX Refining and CONPROCA (the winning company) signed two contracts: The Financed Public Work Contract (FPWC)<sup>762</sup> and the Public Works Unit Prices Contract (PWUPC)<sup>763</sup>. These are the most important documents in this relationship and which interpretation has been the main work of the

<sup>760</sup> On 6 May 1997 a clarification was published in which it was established that variations in the works involving additional work not included in the original scope, would be subject to a Unit Prices Public Works Contract.

<sup>761</sup> <http://www.sipse.com/noticias/26185--produce-biodiesel-refineria-cadereyta.html>

<sup>762</sup> The purpose of this contract was “the Cadereyta project implementation by the Contractor in accordance with contract specifications, the implementation program and all other terms and conditions of this contract.” See Clause 2nd. The contractor agrees at its sole expense, all the work may be necessary or appropriate to carry out the Cadereyta project.

<sup>763</sup> The purpose of this contract was “the execution by the contractor of all work may be necessary to carry out the variations involving the Cadereyta Project that imply additional work not included within the scope of works foreseen at the Financed Public Works Contract to be requested by work orders, which would be made on payment of unit prices to be specified in the Catalogue of Concepts and according to that contract. See Clause 2nd.

arbitral tribunal. Additionally, the 7 July 2000 they made the Recognition and First Debit Interim Payment Agreement.<sup>764</sup> On 15 November 2000, they concluded the Complementary Works Agreement.<sup>765</sup> On 12 December 2000, the parties also concluded the Critical Event Set Agreement in which they decided to adjust the last three dates of critical events.<sup>766</sup> On 8 January 2001, they made the Direct Expenditure Agreement.<sup>767</sup> Finally, on 20 April 2001, PEMEX, PEMEX Refining, and CONPROCA made the Completion of Financed Public Works Contract Agreement.<sup>768</sup>

So, in the development of these contracts, disputes arose between the parties, which were focused on, among other things, CONPROCA's claims that there were additional works in the administration of the Financed Public Works Contract out of the specifications and scope of the contract and therefore, it claimed the payment of such work. CONPROCA also argued direct expenses incurred in the development of that contract that were not paid. For its part PEMEX sought the restitution of all or part of the sums that were recognized to CONPROCA in the Complementary Work and the Direct Expenditure Settlement Agreement. On the other hand, it was argued that the independent expert made a manifest error or illegality in some of the expert's report and therefore that PEMEX is entitled to be paid the amounts paid according to such a report.

According to the Terms of Reference, the total amount of litigation is USD\$497'396,797.00 in addition to the reimbursement of interest and financial costs, considered by CONPROCA and by PEMEX Refining in an amount not less than approximately USD\$137'000,000.00 not including compensation for damages, or accessories, which right the defendants could have, as a result of CONPROCA's breaches. It is relevant to mention that there was a moment the amount of the dispute considering both parties claims became USD\$1,600'000,000.00.

The procedure was an arbitration administered by the ICC<sup>769</sup>, where CONPROCA was the Plaintiff and PEMEX Refinación was the defendant. The arbitral tribunal was formed by: Juan Pablo Cárdenas Mejía, President (Colombia), Bernardo Cremades Sanz-Pastor, co-arbitrator (Spain), and Alejandro Ogarrío Ramírez, co-arbitrator (Mexico). The place of the

<sup>764</sup> It has the purpose to recognize by the Owner that there is a present or future indebtedness derived from various additional work orders made under the COPPU, in the form of PIDIREGAS. See Clause 1st.

<sup>765</sup> The object was "to recognize by the Owner that there is a present or future indebtedness, derived from additional work not included within the scope of works requested under the COPF with work orders made under the COPPU in the form of PIDIREGAS.

<sup>766</sup> Works Progress at 97.9%; provisional acceptance of all units except from the integrated information system of the refinery and the progress of the works at 100% and the provisional acceptance of the integrated information system of the refinery.

<sup>767</sup> Through this contract, the Owner acknowledges and the contractor agrees that for direct expenses are to be reimbursed on an interim basis through the trust called PEMEX Project Funding Master Trust, the amount of USD\$68'375,606.00 provided it is presented the corresponding bail, which are reasonable and are properly documented and were caused by the constant interruptions in the course of the work, resulting from acts or omissions of the Owner, to the work object of the COPF.

<sup>768</sup> It was agreed that the Contractor was obliged to make the completion of the activities therein described within a maximum of 45 days from the date of delivery of the certificate of provisional acceptance.

<sup>769</sup> Arbitration No. 11760/KGA/CCO/JRF.

arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>770</sup> The procedure initiated on 14 Septiembre 2001 when CONPROCA presented the request for arbitration before the ICC. The Terms of Reference were issued in Mexico City on 10 June 2002.

On 25 and 26 November 2004 a hearing was held in Mexico City with the purpose to organize the proceeding, focused on the liabilities issues. Another hearing was held in Mexico City on 4 May 2006 where the tribunal announced to the parties its provisional opinion on the issues that were the subject of the first hearing of liabilities. From 15 to 20 January 2007 the second hearing on liability was held, and on 21 and 22 January 2007 the arbitral tribunal decided to carry out a visit to the site where the works were developed, it means an inspection to the refinery Hector R. Lara Sossa at Cadereyta City, to the pumping station “El Tejar” and to an isolating valve in the city of Veracruz. On 4 April 2007 the parties presented their post-liability-hearing final arguments.

On 17 December 2008 the arbitral tribunal issued an award on liability where it was decided to: (i) state that the independent SGS expert, fell into a manifest error or excess of faculties in the cases therein mentioned; (ii) state that there was no manifest error, nor excess in the performance of the expert nor other illegality in other SGS rulings challenged by PEMEX; (iii) state that the CONPROCA’s claims therein mentioned thrived to the extent specified in the relevant part; (iv) state that some PEMEX’s claims thrived in the manner and within the scope outlined in the relevant part; (v) state that PEMEX Refinery is responsible for the delays and disruptions caused to CONPROCA by acts or omissions of the owner, of the technical audit, of any licensee or of any contractor of the owner under the terms of the COPF, (vi) state that PEMEX Refinery is responsible for the acceleration by CONPROCA to meet PEMEX requirement of the meeting held on March 11, 1998, (vii) state that PEMEX Refinery is responsible for the loss of productivity suffered by CONPROCA due to the interruptions and delays attributable to PEMEX for acts or omissions of the owners, of the technical auditor, of any licensee or of any contractor of the owner under the terms of the COPF; (viii) state that PEMEX Refinery’s responsibility for CONPROCA’s claims on value added or additional works, do not exceed the amount of eighty million dollars in accordance with the COPPU, (ix) state that the contractor’s responsibility for units that have received provisional acceptance, does not exceed sixty million dollars, in accordance with the provisions of the COPF. Also, to state that the contractor’s liability for other breaches does not exceed one hundred twenty million dollars, (x) deny other claims and liability counterclaims of the parties.

On the quantification stage, the arbitral tribunal will decide the rest of the claims, including the amount of the financial costs, the costs of the arbitration and will specify the indemnification consequences, after having heard the parties in the established timely

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<sup>770</sup> Constitución, Ley de Adquisiciones y Obras Públicas in force.

way.<sup>771</sup> The parties are awaiting the final award that relates to these issues, which is expected soon.

#### **5.14.2. PEP Arbitrations.**

##### **5.14.2.1. PEP vs. PROTEXA.**

The Protexa Group consists of Construcciones Protexa, S.A. de C.V. and Protexa Construcciones, S.A. de C.V. The Protexa Group's activities dated in 1945, where it was established in Monterrey, Nuevo León as a small company that started in the production and application of waterproofing products for residential and industrial use in Monterrey. In 1955, the company ventured into the construction industry, managing contracts for laying of pipelines. Its international experience began in 1960 with the installation of industrial plants in Colombia and then in Argentina, Brazil, Chile, Venezuela and Italy. Protexa's experience in laying pipelines and oil drilling led to the subsequent development of complex engineering works for conducting water, gas, oil or other fluid in all types of terrain and geographical location, whether sea, swamps or rivers, which has given Protexa great prestige in Mexico, Latin America, United States of America and Asia. The company has built 17,000 km of pipeline laid in Latin America land equivalent to 1.3 times the diameter of Earth.

The parties made a Unit Prices and Determined Time Public Works Contract PEP-O-IT-186/97 to drill 38 oil wells in northern Mexico, in a place known as the Burgos Basin.

Protexa fulfilled its obligations; however, there was a delay in the execution of the work object of the Contract as a result of the following events attributable to PEMEX: (i) delay in the delivery of the document containing the Agreement, (ii) defaults under the heading of "Locations", (iii) unanticipated work do not foreseen on the Contract, (iv) delays that prevented the receipt of wells due to the construction of discharge lines, and (v) a negative impact on Protexa's flow for the execution of the works, as a result of late payment of invoices by PEMEX. PEMEX terminated the contract.

The procedure was an arbitration administered by the ICC<sup>772</sup>, where PROTEXA<sup>773</sup> was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Carlos Loperena Ruiz, President (Mexico), Fernando Estavillo Castro, co-arbitrator (Mexico), and Javier Arce Gargollo, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>774</sup>

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<sup>771</sup> On 16 January 2009 PEMEX requested correction of the award and on 24 March 2009 the arbitral tribunal issued an Addendum to the award on liability.

<sup>772</sup> Case 10850/KGA.

<sup>773</sup> The defendant was composed of two companies: Construcciones Protexa, S.A. de C.V. and Protexa Construcciones, S.A. de C.V.

<sup>774</sup> Constitución, Ley de Adquisiciones y Obras Públicas in force.



The procedure started on 17 January 2000 when the Request for Arbitration was received by the Secretary of the ICC. The 5 July 2000 the Terms of Reference were issued and from 22 to 24 January 2001 the hearing was held, through which the experts and witnesses presented their opinions. On 29 June de 2001 the closing of the proceedings took place. On 26 November 2001 a partial award was issued and on 2 October 2002 the final award was issued on Mexico City.

The arbitral tribunal rendered its award on 2 October 2002 in Mexico City, by which it decided: (i) not to condemn the defendant to pay the sum of USD\$7,083.33 that the claimant argues that the defendant withheld in excess for the penalty of USD\$10,000.00 a day for delays in deliveries in the second and third critical date, since there was no condemnation of that amount in the partial award, or considered it in the addeudum, (ii) there is a balance in favour of the defendant by way of penalty of 10% agreed in the contract and fixed in the amount of USD\$710,269.01, so is condemned to the claimant to pay the defendant, (iii) on account of work performed and not paid by PEMEX, it owes the claimant the amount of USD\$10'868,894.16, (iv) determine a tradeoff between what a party; (iv) determine a tradeoff between what one party owes the other, in order to extinguish the reciprocal debts to the amount of the smaller, so that a balance in favor of the claimant for the amount of USD\$10'158,625.15 (v) order the defendant to pay the interest until June 30, 2002, amounted to USD\$5'929,233.94, (vi) order the defendant to pay the claimant the amount of USD\$319,700.00 for concept of fees and expenses of the arbitral tribunal and the ICC administrative expenses.

#### **5.14.2.2. PEP vs. BICONSA.**

Bufete Industrial Construcciones, S.A. de C.V. (BICONSA) known also as or Grupo Bufete Industrial is a Mexican holding company that, through its subsidiaries, provides integrated engineering, procurement, and construction services in ten countries. These services are divided into three areas: industrial process and power generation plants; urban projects; and infrastructure projects and manufacturing plants. BICONSA also provides planning, consulting, and appraisal services to its clients. The company has completed more than 1,000 large-scale projects in a variety of industries. It has the largest engineering work force in Mexico.

On July 31, 1998, the parties made a Unit Prices and Determined Time Public Works Contract. Later on, on 4 May 2000, they made an Agreement to terminate the Contract PEP-0-IT-171/98(EPC23). On 15 February 2001, they made a Modification Agreement of the Agreement to terminate the Contract PEP-0-IT-171/98(EPC23). Finally the parties made a Termination Agreement of the Contract PEP-0-IT-171/98(EPC23).

The conflict arises because of doubt as to compliance or not by BICONSA of programs to handover materials and equipment as well as the applicability or not of the contractual penalties for failure to comply with the obligations agreed to by reasons attributable to the plaintiff. The amount of contractual penalties that were applied for the defendant to the plaintiff amounted respectively to the amounts of MP\$1'288,917.47 and



USD\$2'803,819.83. It was also questioned the appropriateness of the BICONSA's request for the return of the amounts deducted by PEP, by way of penalties, for not being arbitrable subject matters. Finally, there was also doubt of the existence of PEP's payment obligation till the settlement agreement and BICONSA's responsibility of the delay.

The procedure was an arbitration administered by the ICC<sup>775</sup>, where BICONSA was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Rodolfo Cruz Miramontes, President (Mexico), Manuel García Barragán, co-arbitrator (Mexico), and Darío Oscós Coria, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>776</sup>

The procedure started on 10 January 2003 when the Request for Arbitration was received by the Secretary of the ICC. On 22 March 2004 the Terms of Reference were issued and on 26 August 2004 the hearing was held, through which the experts and witnesses presented their opinions. On 22 October 2004 the closing of the proceedings took place and finally on 31 August 2005 the award was issued on Mexico City.

The tribunal issued its decision on 31 January 2005 in Mexico City by which it decided (i) that the arbitration clause does not apply by extension to the Irrevocable Trust Contract nor the Irrevocable Assignment of Rights Contract made by and between BANCOMEXT and BICONSA, (ii) The estoppel defense does not operate for having filed the lawsuit in time, (iii) BICONSA failed to timely comply with the delivery and receipt of materials and equipment programs, (iv) due to the absence of proof on the contrary, the contractual penalties for breach of the obligations agreed proceeded, therefore no cash amounts must be returned by PEP to BICONSA; (vi) nor is there any payment obligation by PEP for delay in the development of the settlement because it took place at the time that the facts allowed, (vii) each party will bear the expenses of the coast and expenses of arbitration.

#### **5.14.2.3. PEP vs. BIMMSA.**

Bufete de Infraestructura Marítima Mexicana, S.A. de C.V. (BIMMSA) is Mexican company with expertise in public works.

On 26 November 1997, the parties made a Unit Prices and Determined Time Public Works Contract (Contract No. PEP-O-134/97), to the effect that BIMMSA undertake certain works to PEP. Later on, on 14 February 2001, the parties entered into a Settlement Agreement.

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<sup>775</sup> Case 12527/KGA/CCO.

<sup>776</sup> (i) Ley de adquisiciones y Obras, DOF published on 30 December 1993, (ii) Ley de obras publicada, DOF 13 February 1985; (iii) Ley reglamentaria del artículo 27 constitucional en el ramo del petróleo, DOF 29 November 1958; (iv) Reglas generales para la contratación y ejecución de obras públicas y de servicios para las dependencias y entidades de la administración pública federal; (v) Ley Orgánica de petróleos mexicanos y de organismos subsidiarios DOF 16 July 1992; (vi) Código civil Federal, supplementary; (vii) Código de Comercio, and (viii) Código federal de procedimientos civiles.

The conflict arises because of the interpretation of whether the claim referred to in the fifth clause of the settlement agreement is subject to the condition that: (i) the applicant's claim was made within 120 days from the date of the settlement agreement, (ii) it has been obtained from the Mexican Chamber of the Construction Industry a general statement by the authorities concerned with the matter, in the sense of applicability of the rule 3.3.7 and (iii) it was established that the claim is justified and if so, whether this condition was fulfilled to file a claim.

The procedure was an arbitration administered by the ICC<sup>777</sup>, where BIMMSA was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Rodrigo Sánchez-Mejorada Velasco, President (Mexico), Darío Oscós Coria, co-arbitrator (Mexico), and Eduardo Siqueiros T., co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>778</sup>

The procedure started on 26 May 2003 when the Request for Arbitration was received by the Secretary of the ICC. On 30 March 2004 the Terms of Reference were issued and on 4 May 2004 the hearing was held, through which the experts and witnesses presented their opinions. On 11 May 2004 the closing of the proceedings took place and finally on 29 September 2004 the award was issued on Mexico City.

The tribunal issued its decision on 29 September 2004 in Mexico City by which it decided that BIMMSA has not right to file a claim covered by this arbitration and that each party will pay its own costs.

#### **5.14.2.4. PEP vs. COMMISA-I.**

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) is a Mexican company which major shareholder is Halliburton Company an American company, erected according to the laws of Delaware. This company was founded in 1919, and is one of the world's largest providers of products and services to the energy industry. With more than 60,000 employees in approximately 80 countries, the company serves the upstream oil and gas industry throughout the lifecycle of the reservoir, from locating hydrocarbons and managing geological data, to drilling and formation evaluation, well construction and completion, and optimizing production through the life of the field.<sup>779</sup>

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<sup>777</sup> Case 12740/KGA.

<sup>778</sup> (i) Ley de adquisiciones y Obras, DOF published on 30 December 1993, (ii) Ley de obras publicada, DOF 13 February 1985; (iii) Ley reglamentaria del artículo 27 constitucional en el ramo del petróleo, DOF 29 November 1958; (iv) Reglas generales para la contratación y ejecución de obras públicas y de servicios para las dependencias y entidades de la administración pública federal; (v) Ley Orgánica de petróleos mexicanos y de organismos subsidiarios DOF 16 July 1992; (vi) Código civil Federal, supplementary; (vii) Código de Comercio, and (viii) Código federal de procedimientos civiles.

<sup>779</sup> Halliburton consists of two divisions: Drilling and Evaluation and Completion and Production. As of 31 December 2010, these two divisions accounted for approximately 18.0 billion dollars in Revenue. See: <http://www.halliburton.com/aboutus/default.aspx?navid=966&pageid=2458>.

On 22 October 1997, PEP and COMMISA made a Public Works Contract No. PEP-0-129/97 for the execution by COMMISA of the engineering, procurement, manufacturing, transportation, installation, interconnection, testing and startup of two offshore platforms, one for compression (AC-2) and the other one for gas processing (AC-3) located in the Bay of Campeche, in the territorial waters of the United Mexican States. On 26 May 2003 COMMISA and PEP made the General Agreement on Conciliation to the Public Works Contract No. PEP-0-129/97 by which they agreed to enter into specific agreements A, B and C with the aim to defining the terms and conditions for their consensus. On 29 May 2003 they concluded the Specifies C Agreement for completion of the additional work.

On 29 March 2004 PEP notified COMMISA the initiation of the procedure for administrative rescission of the contracts, focusing the conflict thus on determining whether PEP breached the obligations contracted by the original Contract, the Conciliation Agreement and the C Agreement, as well as on determining whether COMMISA is entitled to an additional time to complete the EPC-I project and if it has other obligations before PEP.

The procedure was an arbitration administered by the ICC<sup>780</sup>, where COMMISA was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Jorge Suescun Melo, President (Colombia), Henri Alvarez, co-arbitrator (Canada), and Darío Oscós Coria, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>781</sup>

The procedure started on 1 December 2004 when the Request for Arbitration was received by the Secretary of the ICC. On 28 November 2005 the Terms of Reference were issued and from 27 November to 5 December 2007 the hearing was held, through which the experts and witnesses presented their opinions. On 16 December 2009 the award was issued on Mexico City.

The arbitral tribunal rendered its award on 16 December 2009 in Mexico City, by which: (i) dismissed the plea and *res judicata*, as well as other defenses and arguments raised by PEP to prevent the arbitral tribunal decides the merits of the dispute, (ii) ordered PEP to pay COMMISA the sums of USD\$286'101,437.17 plus MP\$34'459,577.58, plus interest, amounts that correspond to the claims that were received by the tribunal, (iii) rejected the claim of COMMISA denominated "III 3.4. Demobilization costs"; (iv) ordered COMMISA to pay the penalty stipulated for breach of the first critical event, which is USD\$5'000,000.00 together with the penalty for delay in achieving also the first critical event, which corresponds to an amount of USD\$737,000.00 for a total of USD\$5'737,000.00 (v) ordered COMMISA to pay PEP amounts for the balance in favour of the latter resulting from claims made by COMMISA on change orders 31 and 32<sup>782</sup>,

<sup>780</sup> Case 13613/CCO/JRF.

<sup>781</sup> Constitución, Ley de Adquisiciones y Obras Públicas in force.

<sup>782</sup> Change Order 31. Credit balance of PEP USD\$90,007.65. The recognition of this right was claimed by PEP with the claim "IV 2.1.5. TMR board AC-2 and AC-3" it made in the counterclaim. Change Order 32. Credit balance of PEP USD\$39,313.13 for a total of USD\$129,320.78.

sentenced COMMISA to pay PEP the sum of USD\$53,248.53 for interest on the balance in favour of the latter resulting from the change order 31, (vi) condemned PEP to pay COMMISA, on account of the costs due incurred to defend their rights in this arbitration the sum of USD\$7'544,536.39.

#### **5.14.2.5. PEP vs. COMBISA.**

COMBISA, S. de R.L. de C.V. (COMBISA) is a Mexican company with expertise in the field of public works.

On 24 July 1998 PEP and COMBISA signed a Unit Prices Public Works Contract, Contract No. PEP-O-(EPC-22) throughout which PEP instructs COMBISA the implementation of a work that included engineering, design, fabrication, load, tie, shipping and installation, offshore testing and start of the platforms. The total contract amount was MP\$486'109,712.81, plus USD\$465'236,070.26. The Initial period for implementation of the contract was 909 natural days. Throughout the execution of the projects 10 agreements modifying the contract agreeing new terms and expanding the amount of the contract were signed.

COMBISA demanded PEP the payment of USD\$235'770,000.00 and requested a declaration that is entitled to an extension of the critical date for the platform AB-1 and that PEP is not entitled to (i) charge any conventional penalty for any delay in compliance with the critical date for the AB-1 platform, (ii) receive any compensation for any loss or damage, (iii) receive any compensation for the work on the corrosion protection system or on the cleaning and (iv) receive any additional credit for the cost of the work COMBISA did not run. PEP meanwhile, asked to be declared inadmissible the COMBISA's claims consisting of the payment of each and every one of the amounts resulting from: (i) contractual penalties for failure to the first critical date "connection and test Akal-B, oil production - ready to receive first oil" calculated on the sum of USD\$7'700,000.00, (ii) boats provided by PEP, for accommodation and food supply in the sum of MP\$11'305,087.99 plus USD\$18'870,328.82, and the payment of damages caused in the approximate amount of USD\$16'000,000.00.

The procedure was an arbitration administered by the ICC<sup>783</sup>, where COMBISA was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Bernardo M. Cremades, President (Spain), Yves Derains, co-arbitrator (France), and Darío Oscós Coria, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>784</sup>

The procedure started on 18 January 2005 when the Request for Arbitration was received by the Secretary of the ICC. On 4 November 2005 the Terms of Reference were issued and

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<sup>783</sup> Case 13683/CCO.

<sup>784</sup> Constitución, Ley de Adquisiciones y Obras Públicas in force.

from 27 to 30 November 2006 the hearing was held, through which the experts and witnesses presented their opinions. On 9 July 2007 the award was issued on Mexico City.

The arbitral tribunal rendered its award on 9 July 2007 in Mexico City, through which dismissed in full the claim of COMBISA on (i) indirect and financing costs in the amount of USD\$91'500,000.00, (ii) on associated costs with the “changing conditions” (cost of housing in sea vessels amounting to USD\$41'300,000.00, (iii) 15% percent of contracting profit claimed by COMBISA in relation to its claims for indirect and financing costs and associated costs with the change in conditions. It partially also upheld the COMBISA's claim for Unpaid Change Notifications (extra work) for the amount of USD\$46'258,004.00<sup>785</sup> against the USD\$53'600,000.00 claimed, and partially upheld the COMBISA's claim for Unpaid Payment Entries for an amount of USD\$15'313,155.00 versus the USD\$15'700,000.00 claimed.

Finally, it declared that COMBISA is entitled to an extension of the critical date of the AB-1 platform till 23 July 2002, and that PEP has no right to charge a contractual penalty for delays in meeting the critical date for the Platform AB-1. With respect to the counterclaim, it rejected in full PEP's claim on contractual penalties for breach of the critical date of the AB-1 platform “Connecting and Testing Akal-B, Crude Oil Production - Ready to Receive the First Oil”, it partially upheld the claim on boats provided by PEP, for accommodation and meals in different housing facilities offshore, estimating the PEP counterclaim amounting to USD\$4'594,000.00 for the items listed in the changing notice No. 92. It entirely dismissed the counterclaim of PEP for compensation with respect to the changing notice No. 113.

#### **5.14.2.6. PEP vs. COMMISA-II.**

Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) is a Mexican company which major shareholder is Halliburton Company.<sup>786</sup>

On 4 September 1998, but with effect from 26 August 1998, the parties signed the Unit Prices and Determined Time Public Works Contract EPC-28, which object was the execution of a work consisting of the design, procurement, manufacturing, pipe laying, corrosion resistant coating, weighed, cathodic protection, upstream pipelines, installation and valves testing of certain products that are part of the Project for Modernization and Optimization of the Cantarell Field located off the coast of Campeche, Mexico. The contract was amended by 16 Amendment Agreements.

COMMISA claimed the payment of additional compensation in the amount of MP\$40'199,217.00 plus USD\$142'400,415.00, and the corresponding financial charges and that it was entitled to an extension of five days to the date of completion of the work under the contract. PEP claimed it was entitled to: (i) a payment of USD\$135,000.00 for a

<sup>785</sup> The award had the wrong amount of 45,958,004.

<sup>786</sup> See supra pp. 260.

penalty of 5 days after the critical date agreed in the agreement, (ii) a payment of USD\$1'135,000.00 corresponding to an addition to the penalty clause for delay of 372 days in "termination of support operations and delivery of final documentation", and (iii) payment of MP\$461,000.00 plus USD\$779,000.00 approximately on the concept of support provided by PEP to COMMISA, for crane support services to platform and ship support for underwater inspection of the line 28-02.

The procedure was an arbitration administered by the ICC<sup>787</sup>, where COMMISA was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Juan Fernández-Armesto, President (Spain), José W. Fernández, co-arbitrator (USA), and Darío Oscós Coria, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.

The procedure started on 11 February 2005 when the Request for Arbitration was received by the Secretary of the ICC. On 6 September 2005 the Terms of Reference were issued and from 5 to 9 June 2006 the hearing was held, through which the experts and witnesses presented their opinions. On 15 January 2008 the award was issued on Mexico City.

The tribunal issued its decision on 15 January 2008 in Mexico City by which it decided to condemn PEP to pay COMMISA, as remuneration and due compensation under the EPC Contract-28, the sum of "S" Mexican Pesos ("MP"), calculated in accordance with the formula therein set forth.<sup>788</sup> As well as convict PEP to pay COMMISA as financial expenses resulting from the EPC-28 Contract, interest calculated on the sum "S", defined in the previous decision. The financial costs will accrue from 29 September 2002 to the date of actual payment at the rate established from time to time in the Federation Revenue Law<sup>789</sup> for the cases of extension of time for payment of tax credits. The calculation shall be for days and the payment of expenses are made together with the sum "S" defined in the previous decision.

The decision of the Arbitral Tribunal was unanimously adopted, except that the arbitrator Dario Coria Oscos dissented from the majority opinion regarding the technical controversies 36 ("bad times that affected the work of the Castoro 10 and Bar Protector"), 34 and 35 ("Waiting times for delays in starting the work of the Castoro 10 and the Bar Protector") and the calculation of interest and costs. His dissenting opinion on these issues was included in a separate opinion.<sup>790</sup>

<sup>787</sup> Case 13716/CCO/JRF.

<sup>788</sup>  $S = (A+B) \times 0,995$ . In which: "S" is the sum in MP that PEP has to pay to COMMISA. "A" is equal to 10.928.728 PME. "B" is the sum in MP which results from converting 75.075.635 USD dollars in MP the exchange rate that the Bank of Mexico has been determined and published in the Official Journal of the Federation on the business day immediately prior to September 29, 2002. "+" Is the sign of addition. "X" is the multiplication sign. "=" Is the sign of equality. 0.995 reflects the reduction of 5 per thousand that is required to pay COMMISA in favour of the Office of the Comptroller and Administrative Development.

<sup>789</sup> Ley de Ingresos de la Federación.

<sup>790</sup> In his dissenting opinion stated that: (i) The technical controversy 36 due to bad times is unfounded and unattended, so that the defendant should be dismissed for the corresponding provision of payment, (ii) the defendant was acquitted of technical disputes payment of 34 and 35, under which the plaintiff failed to prove



It is important to note that in the award the arbitrators do not use a proper reasoning, in our opinion, because they are not establishing the legal principle of Mexican law that was violated. However, the Mexican arbitrator, in his dissenting opinion makes a good command of Mexican law, in what is mentioned, the Federal Civil Code (art. 19, 1796, 1851), the Amparo Law (art. 192, 193), case law criteria of the Federal Courts of Mexico (Registration No. 186.972, No. 182.583 Registry, Registry No. 200.941), the Acquisitions and Public Works Law (art. 1, 13, 70) the Constitution (Art. 14, 134). One can clearly see the Mexican arbitrator handled the Mexican law much better than the other two arbitrators.

#### **5.14.2.7. PEP vs. ECH.**

ECH Offshore, S. de R.L. de C.V is a Mexican company with foreign investment in charge of the engineering, construction and operation of marine pipelines.

On 18 August 2000, the parties made a Unit Prices and Determined Time Public Works Contract number PEP-0-AD-317/00 (EPC-64), which object was the execution of works aimed to the engineering, procurement, construction and operation of 7 marine pipelines, pending of the EPC-27 (27-01, 27-02, 27-03, 27-04, 27-05, 27-13, 27-14) 3 for collection and transportation of oil and 4 for gas distribution in the pneumatic pumping system in the Cantarell field. In addition, 12 Modification Contracts were made and a Use of Boats Agreement was also made.<sup>791</sup>

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the amount of the fair costs, reasonable and properly tested incurred by waiting times for the start of the mobilization of the vessels Castoro 10 and Bar Protector (iii) the applicant's claim for interest expense, technical controversies about numbers 34 and 35 delays, 36 bad times and 20 placing sandbags cement is unfounded and unfair. Therefore, this claim is acquitted to the defendant for not existing default of payment of the defendant, (iv) PEP refrained from engaging in any act that may bear the costs of arbitration. Its legal approach is correct and prevailed in his opinion, with regard to technical disputes claims made as numbers 34, 35, 36 and 20.

<sup>791</sup> (i) Agreement number one, dated 13 March 2001 which extended the termination date to 9 April 2001, (ii) Agreement number two, dated 9 April 2001 which extended the termination date to 13 May 2001, (iii) Agreement number three, dated 18 May 2001 which extended the termination date to 15 July 2001, (iv) Agreement number four, dated 13 May 2001 which extended the termination date to 31 December 2001, (v) Agreement number five, dated 21 November 2001 which extended the contract amount in MP\$23'901,617.19 plus USD\$9'037,618.48, (vi) Agreement number six, dated 28 December 2001 which extended the termination date to 14 January 2002, (vii) Agreement number seven, dated 10 January 2002 which extended the contract amount in MP\$5'751,165.84 plus USD\$2'663,841.77 and extended the termination date to 7 February 2002, (viii) Agreement number eight, dated 28 January 2002 which extended the contract amount in MN\$98'137,624.15 plus USD\$33'422,123.39, (ix) Agreement number nine, dated 7 February 2002 which extended the termination date to 16 May 2002; (x) Agreement number ten, dated 31 May 2002 which extended the termination date to 18 June 2002, (xi) Agreement number eleven, dated 18 June 2002 which extended the contract amount in MP\$5'521,183.94 plus USD\$13'736,207.59, (xii) Agreement number eight, dated 28 January 2002 which extended the contract amount in MP\$61'569,129.91 MN plus USD\$20'132,947.12, (xiii) Agreement on the use of boats for the Part-time Suspension of Activities 9 February 2001.

The conflict arises when ECH requested the payment of USD\$36'506,909.53 and MP\$106'832,446.20 for work stoppages resulting from extreme weather conditions, plus the corresponding interest payment.

The procedure was an arbitration administered by the ICC<sup>792</sup>, where ECH was the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Fernando David Estavillo Castro, President (Mexico), Alejandro Ogarrio Ramírez España, co-arbitrator (Mexico), and Rodrigo Sánchez Mejorada Velasco, co-arbitrator (Mexico). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>793</sup>

The procedure started on 22 April 2005 when the Request for Arbitration was received by the Secretary of the ICC. On 29 November 2005 the Terms of Reference were issued and on 27 March 2006 the hearing was held, through which the experts and witnesses presented their opinions. On 3 May 2006 the closing of the proceedings took place and finally on 17 July 2006 the award was issued on Mexico City.

The tribunal issued its decision on 17 July 2006 in Mexico City by which it decided (i) to declare inadmissible the special pronouncement exceptions raised by PEP in its response to the request for arbitration, the exception of the lack of authority of the representative of ECH, argued by PEP, (ii) ECH is not entitled to payment for the concepts that constitute his claim (iii) the parties shall bear equally the costs of arbitration.

#### **5.14.2.8. PEP vs. BERGESEN.**

Bergesen World Wide Limited (BWL) Offshore is a Bermudas company and the world's second largest Floating Production Storage and Offloading (FPSO) owners and operators, with more than 25 years' experience and a long track record. Adapting through competence, solid project execution and operational excellence, BWL Offshore ensures that customer needs are met through versatile solutions for offshore oil and gas projects. BWL Offshore is listed on the Oslo Stock Exchange and employs people worldwide in business centres across Europe, Asia Pacific, West Africa and the Americas. The company is noticeably represented in the greater Americas region both in the US and Mexican parts of the Gulf of Mexico, as well as on the Tupi field offshore Brazil. BWL Offshore's FPSO/FSO fleet also includes operations in other parts of the world, including West-Africa and Russia.

On 29 July 2005, PEMEX Exploration and Production, a subsidiary of PEMEX, and BWL entered into a Contract for the Acquisition of a FPSO and Operation and Maintenance

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<sup>792</sup> Case 13819/CCO.

<sup>793</sup> (i) Ley de adquisiciones y Obras, DOF publicada el 30 diciembre de 1993, (ii) Ley de obras publicada, DOF 13 de febrero de 1985; (iii) Ley reglamentaria del artículo 27 constitucional en el ramo del petróleo, DOF 29 noviembre 1958; (iv) Reglas generales para la contratación y ejecución de obras públicas y de servicios para las dependencias y entidades de la administración pública federal; (v) Ley Orgánica de petróleos mexicanos y de organismos subsidiarios DOF 16 julio 1992; (vi) Código civil Federal, forma supletoria; (vii) Código de Comercio, and (viii) Código federal de procedimientos civiles.

Rendering Services (Contract Number 412 005 846). The purpose of this contract was: (i) the design, engineering, construction, installation and testing, carried out by BWL of a “floating, storage, production and offloading (FPSO)” naval craft, (ii) the FPSO operation and maintenance and the rendering of services by BWL for the benefit of PEP during the term of service and (iii) the transfer of ownership of the FPSO for PEP. The total contract price was USA\$66’725,000.00.<sup>794</sup>

The conflict arose while determining the legitimacy of the FPSO price adjustment for PEP (price decrease) due to the change of law, in accordance with the terms of clause 27 of the contract, based on the decree and the reforms to the import and export general tax law.<sup>795</sup>

The procedure was an arbitration administered by the ICC<sup>796</sup>, where PEP was the Plaintiff and BWL was the defendant. The arbitral tribunal was formed by: Fernando Mantilla-Serrano, President (Colombia), Herfried J. Wöss, co-arbitrator (Austria), and Nigel Blackaby, co-arbitrator (England). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>797</sup>

The procedure started on 30 October 2008 when the Request for Arbitration was received by the Secretary of the ICC. On 2 June 2009 the Terms of Reference were issued and from 2 to 4 December 2009 the hearing was held, through which the experts and witnesses presented their opinions. On 12 October 2010 the closing of the proceedings took place and finally on 31 January 2011 the award was issued on Mexico City.

The tribunal issued its award on 31 January, 2011, in Mexico City throughout which dismissed the objections of lack of jurisdiction raised by the parties and stated that the clause 27.1 (in dispute) was valid, effective and enforceable, so proceeded the adjustment referred to in that clause and, therefore, authorized as final retention by PEP of the sum of USA\$34’426,000.00 and ordered BWL to pay PEP the amount of USA\$12’743,046.00 and payment of interest.

#### **5.14.2.9. PEP vs. MILLER/INDUSA.**

Miller Pipeline de México, S.A. de C.V. is a Mexican construction company founded in 1993, engaged principally in the construction and maintenance of pipelines and infrastructure of oil, natural gas, water and telecommunications. Additionally, the company counts with various technologies for rehabilitation, repair and construction of all kinds of

<sup>794</sup> On 12 September 2008, the parties executed an addendum to the clause 40.3 of the acquisition contract above mentioned.

<sup>795</sup> Points in dispute contained in the terms of reference: Preliminary Issues. The objections of the procedure: 1. The objections on jurisdiction *ratione matter* of the arbitral tribunal. a. Jurisdiction of arbitral tribunal to rule on the validity of federal regulations. b. Competence of arbitral tribunal to rule on the validity of the adjustment clause. Merits of the dispute. 1. Validity of adjustment clause. 2. Scope of the price adjustment clause. 3. Payment of the price adjustment of FPSO.

<sup>796</sup> Case 15909/JRF.

<sup>797</sup> Código Civil Federal, Ley de los Impuestos Generales de Importación y Exportación (LIGIE), Ley de adquisiciones, Reglamento de adquisiciones.

pipelines using “Trenchless” methods, with no excavations. Ingeniería y Desarrollo Urbano, S.A. de C.V. is a Mexican company established in 1984 dedicated to the construction of industrial plants and conduction lines. This company works for the private and public sectors, developing engineering and construction designs in the areas of construction, infrastructure, industrial and energy.<sup>798</sup>

On 15 June 2005, the parties signed a Unit Prices Public Works Contract Number PEP-ON-901/05 whose purpose was the construction of a 30" pipeline DN x 3.35 km from C.C.C. Palomas to Nuevo Teampa station with a total of MP\$55'281,034.71, with a deadline of agreed works of 240 days from 15 June 2005 to 9 February 2006.<sup>799</sup>

The conflict arose when the plaintiffs alleged they suffered for lack of building permits and licenses, lack of approved construction plans, no work release areas, substantial changes in the project up to 40.54%, suspension of activities affecting the work program, early termination of the activities that could not be executed and the lack of a defined executive project. In consequence, they demanded the payment of the expenses incurred by them for reasons attributable to PEP, amounting to MP\$36'163,953.23 plus the value added tax, plus USD\$45,124.04 plus VAT.

The procedure was an arbitration administered by the ICC<sup>800</sup>, where MILLER and INDUSA were the Plaintiff and PEP was the defendant. The arbitral tribunal was formed by: Rodrigo Oreamuno Blanco, President (Costa Rica), Fernando David Estavillo Castro co-arbitrator (Mexico), Herfried J. Wöss, co-arbitrator (Austria). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>801</sup>

The procedure started on 17 December 2009 when the Request for Arbitration was received by the Secretary of the ICC. On 7 August 2010 the Terms of Reference were issued and later on the hearing was held, through which the experts and witnesses presented their opinions. It is still pending the closing of the proceedings and issuance of the award.

### **5.14.3. PGPB Arbitrations.**

#### **5.14.3.1. PGPB vs. TEJAS/GNM**

Tejas Gas de Toluca, was created to align the interests of marketers, consumers and market developers to give them open access to its transportation system. It is an alliance of companies with the same vision of long-term goals: Westpark Resources, an energy company based in Houston, Texas and Fermaca Group, an engineering and construction

<sup>798</sup> From the year 2006 they carried out the original company split to divide the administration and provide better service to their customers so far: Ingeniería y Desarrollo Urbano, S.A. de C.V. in the Southeast region of Mexico and Ingeniería y Diseño Urbano, S.A. de C.V. in the central region of Mexico.

<sup>799</sup> During the contracting relationship, the parties signed seven modification agreements.

<sup>800</sup> Case 16786/JRF.

<sup>801</sup> Ley de Obras Públicas y Servicios Relacionados con las Mismas and its regulatory ordering.

company based in Mexico City. Both have joined forces to bring technology and energy project development to the natural gas market in Mexico.

Gas Natural México, S.A. de C.V. (GNM), now known as Gas Natural Fenosa, is a leading multinational company in the field of gas and electricity. It is present in 25 countries and more than 20 million customers. Following the acquisition of the power company Union Fenosa, the third in the Spanish market, Gas Natural Group has completed its goal of integrating electricity and gas businesses into a company with long experience in the energy sector, able to compete effectively in markets undergoing a process of increasing integration, globalization and increased competition.

Tejas Gas International, LTD., Tejas Holdings de México, S. de R.L. de C.V., PGPB and Gas Natural México, S.A. de C.V. (GNM) made on 11 May 1998, a MOU (Memorandum of Understanding) whereby it was agreed to establish the basis of understanding to ensure the construction and operation of pipelines for the Carrier (Tejas Gas de Mexico, S. de R.L. de C.V. - TGM), the Transportation Contract between the Carrier and Trading (company to be formed by PGPB and GNM), and the possible involvement of PGPB and GNM in the Carrier.

PGPB and GNM, as the first party, and TGM as the second party, entered into a Transportation Contract dated on 11 May 1998, whereby the carrier agrees to receive natural gas owned by any of the users in the receiving point, and to transport it through the pipeline (path Palmillas - Toluca) and deliver it at the point indicated by the user in question. Additionally, there are 5 Amendment Agreements to the Transportation Contract.

The dispute arose as for the interpretation, scope and execution of the contracts mentioned above, since it was argued that the circumstances prevailing in 1998, where the original negotiation took place, were not the same as those prevailing at the date of start of operation of the pipeline facilities and the Transportation Contract. The original contract amount was an estimated investment of USD\$31'000,000.00 and it was finally argued that the investment exceeded the original amount and reached USD\$47'200,000.00.

The procedure was an arbitration administered by the ICC<sup>802</sup>, where TEJAS/GNM<sup>803</sup> was the Plaintiff and PGPB was the defendant. The arbitral tribunal was formed by: José Emilio Nunes Pinto, President (Brazilian), Ricardo Peña, co-arbitrator (Chilean), Luis Alberto Erize, co-arbitrator (Argentinean). The place of the arbitration was Mexico, City and the applicable Law was Mexican legislation.<sup>804</sup>

The procedure started on 4 January 2006 when the Request for Arbitration was received by the Secretary of the ICC. On 26 February 2008 the Terms of Reference were issued and later on the hearing was held, through which the experts and witnesses presented their

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<sup>802</sup> Case 14194/CCO/JRF.

<sup>803</sup> The defendant was composed of two companies: Tejas Gas de Toluca, S. de R.L. de C.V. and Gas Natural México, S.A. de C.V.

<sup>804</sup> The arbitration was held in Spanish and English.

opinions. The parties reached an agreement to end up the conflict and an award was issued on Mexico City in accordance with such an agreement.<sup>805</sup>

### **5.15. Characteristics of the Arbitrations.**

After a brief description of the arbitrations in which PEMEX has been a part of, we highlight important features of these procedures:

#### **5.15.1. The Parties.**

First, these procedures have the essential characteristic that both parties have a different legal nature. On the one hand, we have PEMEX which is a decentralized body with legal personality and own patrimony, based in Mexico City and that its object is to exercise central leadership and strategic direction of all those activities covered by the state oil industry.<sup>806</sup> On the other hand, we have private companies whose shareholders are other companies or individuals that have great influence on the international energy market, as most of them have developed projects around the world and have a considerable economic capacity. These companies have a purely commercial nature and are companies whose share capital is represented, in most cases, of stocks or shares involving a limitation on the responsibility of their shareholders against third parties.

The companies with which PEMEX normally negotiates the type of operations that could lead to a dispute to be settled by arbitration, are foreign or Mexican companies with foreign investment, which brings an element of foreign intervention in these proceedings. This is reflected from the way of making the contract as well as the chosen method for conflict resolution. These are procedures that have shades of different legal systems, with the intervention of lawyers with international experience and sometimes even the participation of languages different from Spanish.

According to Galanter, we might divide our actors into those claimants who have only occasional recourse to the courts: one-shotters (OS) and repeat players (RP) who are engaged in many similar litigations over time.<sup>807</sup> It definitely has to be recognized that the case of PEMEX falls within the second category because the result of the quantitative analysis leads to the conclusion that it is an arduous participant in the conflict resolution procedures, whether litigation or arbitration.

It can be said that PEMEX, as its normal and day-to-day course of activities, deals with negotiations that later on will end up in the signing of contracts. Contracts that might trigger conflicts, which would require a proper, modern and fair method to resolve them. These conflicts arise between two parties who do not have the same economic, political and

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<sup>805</sup> We did not have access to the award.

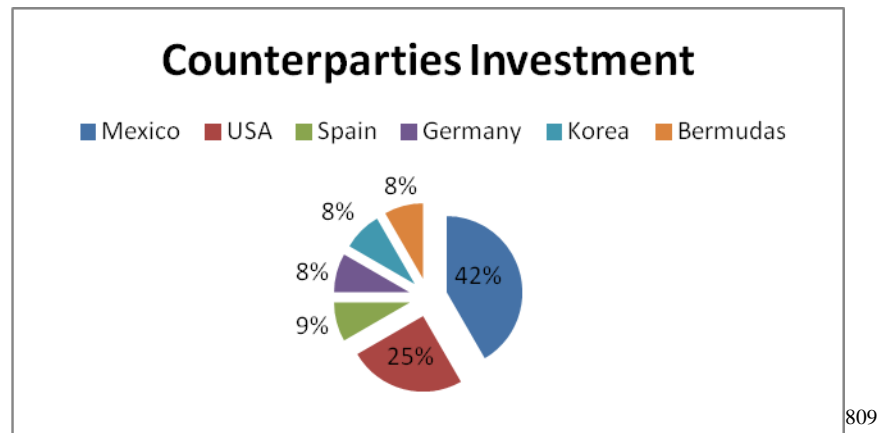
<sup>806</sup> See Article 2do. of la Ley Orgánica de Petróleos Mexicanos y sus Organismos Subsidiarios, as well as the Ley Reglamentaria del Artículo 27 Constitucional en el ramo del petróleo.

<sup>807</sup> Galanter, Marc, "Why the "Haves" come out Ahead: Speculations on the Limits of Legal Change", Faculty of Law and Jurisprudence, State University of New York at Buffalo, Law Society Review, Volume 9, Number 1/Fall 1974.



social weight. In other words, contracts and subsequent arbitration proceedings which can be considered as “unbalanced”. Fiss mentions the concept of imbalance of power, which would be the case of these arbitrations. He considers that the dispute-resolution story that underlies ADR implicitly asks us to assume a rough equality between the contending parties.<sup>808</sup>

Below there is a graphic that shows the country where the investment of PEMEX’s counterparties comes from in the analyzed arbitrations.



### 5.15.2. The High Impact of the Dispute.

Law narrows specific conflicts as socially relevant, leaving their resolution to other forms of social organization, which are usually manifested in social norms or guidelines.<sup>810</sup> A typical example of socially relevant conflicts are, without a doubt, those related to the Oil & Gas industry, in other words, from the Mexican perspective, where PEMEX is a participant.

Sander and Goldberg consider that when determining the appropriate ADR from a public perspective, the legal advisors should consider also the public interest in the dispute. While a private settlement may serve the interest of all parties to the dispute, the public interest may lie in public adjudication.<sup>811</sup>

On the other hand, Fisher considers that principles ruling negotiation for individuals remain equally true for groups or nations. He mentions a very good example of an Oil & Gas Dispute: In negotiations between the United States and Mexico, the U.S. wanted a low price for Mexican natural gas. Assuming that this was a negotiation over money, the U.S. Secretary of Energy refused to approve a price increase negotiated with the Mexicans by a U.S. oil consortium. Since the Mexicans had no other potential buyer at the time, he

<sup>808</sup> Fiss, Owen M., “Against Settlement”, Essay based on a speech given in San Francisco on January 6, 1984”, Yale Law Journal, May, 93 Yale, L.J. 1073, 1984.

<sup>809</sup> The source of this chart was the information gathered while doing the field research in PEMEX.

<sup>810</sup> Robles, Gregorio, Op.cit, footnote No. 5, pp. 170.

<sup>811</sup> Goldberg, S, Sander, F, Op.cit. footnote No. 36, pp. 50.

assumed that they would then lower their asking price. But the Mexicans had a strong interest not only in getting a good price for their gas but also in being treated with respect and a sense of equality. The U.S. action seemed like one more attempt to bully Mexico; it produced enormous anger. Rather than sell their gas, the Mexican government began to burn it off, and any chance of agreement on a lower price became politically impossible.<sup>812</sup>

In the case of PEMEX and after having studied the history of the oil industry in Mexico and the participation that such a company had in it, we have to recognize the influence such history has had on the development of Mexico and the influence that the outcomes (awards) have had on the society, economics and politics of this country. In particular, we mention the CONPROCA Arbitration which has an excessively high amount of dispute and has served on many occasions to attack PEMEX officials. An example of this are the “*periodicazos*” (news) that have been published over the last ten years, where PEMEX participation on it has been demonized and where it has been reported erroneously that PEMEX has lost exuberant amounts of money, always driving the idea that such a money is Mexican people’s, which obviously makes the people angry without really knowing the background of the dispute.

The fact that a public entity loses an arbitration procedure and that the outcome forces it to make a substantial payment, with no doubt, it would have a significant impact. The media (newspapers, the news, the editors) would question the performance of the public organism in the process, if the result is negative they would propose to investigate the causes of having reached that result. If it was a poor defense of the interests of the entity or whether there was any irregular transaction or if the issue became complicated and increases the amount or the importance of the dispute, it would certainly have a social impact that it would be detrimental to the use of alternative means of dispute resolution.

### **5.15.3. The Participants.**

Participants in these arbitration proceedings are also a characteristic of them, as they require, at least in theory, a very specific expertise in both the Oil & Gas industry as well as public work contracts.

Starting with arbitrators, though we talked about them in the Chapter II, it is important to emphasize the importance of the expertise they should have, whether lawyers or not. Bernardo Cremades considers that an arbitration chairman must possess special human and professional qualities: he/she should be comprehensive; he/she should listen carefully to the parties and should be able not only to speak their language, but also to understand their respective approaches and be acquainted with their cultural backgrounds.<sup>813</sup>

<sup>812</sup> Fisher, Roger, Ury, William, Op.cit. footnote No. 46, pp. 50.

<sup>813</sup> Cremades, M. Bernardo, Op.cit. footnote No. 71, pp. 153.

Roberto Bergalli, refers to the cultural traditions that influence the professional ideologies of the judges,<sup>814</sup> which should not but we believe that it is the case with some arbitrators; hence the importance of the need for arbitrators not to be influenced by their cultural traditions. In the arbitration proceedings analyzed, we see the common denominator that most of the arbitrators were not Mexican, which, from our point of view, brings the influence, in a large or small measure, of their legal cultures while resolving the conflict.

On the other hand, we have lawyers, whose role is to extract from the law all the means to achieve their goals. They cannot expect to win a case by invoking causes that do not come from law as the base of their defense before a tribunal.<sup>815</sup> The attorney should know the history and the vicissitudes of the countries where these alternatives have been formally introduced, if they want to handle them.<sup>816</sup>

According to Galanter, parties who have lawyers do better.<sup>817</sup> Lawyers exercise considerable power over their clients. They maintain control over the course of litigation. There is evidence that lawyers often shape disputes to fit their own interest rather than those of their clients.<sup>818</sup>

According to Simons, the strand of alternative intervention which focuses upon the provision of support for party negotiation implies a changed and diminished role for lawyers in some areas of disputes.<sup>819</sup> At the very least it suggests that in the case of successful bilateral negotiation, lawyers would typically be confined to an auxiliary, advisory position rather than a central managerial, representative role.<sup>820</sup>

One of the most important advantages of arbitration or any ADR is that a party can be represented by his/her regular counsel, without having the necessity of hiring a local lawyer when doing business abroad. It is the accepted practice in most countries where international arbitrations are held, that foreign lawyers may appear as counsel or arbitrator, even though he/she is not a member of the local Bar or trained in the legal system of the place of arbitration.<sup>821</sup> However, there are some local restrictions on counsels and arbitrators, which have to be considered in different legal cultures. For example, the best known case because it has been widely discussed, is the case of Singapore, where the High Court, in a 1988 decision<sup>822</sup> held that a New York law firm could not represent its client in an international arbitration in Singapore, till the amendment to the Legal Profession Act in

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<sup>814</sup> Bergalli, Roberto, "Jurisdicción, Cultura e Ideología de los Jueces", "Derecho y Sociedad", (coordinadores) María José Añón, Roberto Bergalli, Manuel Calvo, Pompeu Casanova, Titant lo Blanch, "Universitat de Barcelona, Valencia, 1998, pp. 482.

<sup>815</sup> Arnaud, André-Jean, Fariñas Dulce, María José, Op.cit. footnote No. 33, pp. 280 - 286.

<sup>816</sup> Arnaud, André-Jean, Fariñas Dulce, María José, idem., pp. 288.

<sup>817</sup> Galanter, Marc, Op.cit. footnote No. 807.

<sup>818</sup> Cain, Maureen, Kulcsar, Kalman, Op.cit. footnote No. 227, pp. 645.

<sup>819</sup> To see more information on the role, status specifically on lawyers, see, Ferrari, Vincenzo, Op.cit. footnote No. 128, pp. 130-150.

<sup>820</sup> Roberts, Simon, Op.cit. footnote No. 85.

<sup>821</sup> Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 59 - 60.

<sup>822</sup> *Buildings Federal Ltd and Joseph Gartner & Co. v. Turner (East Asia) Pte. Ltd.* (1988) 2 MLJ 280 (Singapore High Court).

1992 when foreign lawyers have had the right to represent their clients in Singapore in arbitrations in which the law governing the dispute is not Singapore law. The same issue, as whether foreign lawyers are able to represent their clients in other jurisdictions, has been brought to different courts in Quebec, Canada, Malaysia, Barbados and the USA where they have confirmed the general practice that foreign lawyers may appear in arbitrations abroad.

On the other hand there are legislations that, on the contrary, give express support to this situation, such as the case of Hong Kong where the law expressly states that anyone may act as a party's representative in arbitrations, or the Tunisian law that stipulates that nobody may be excluded as arbitrator because of his nationality, unless the parties have agreed otherwise.

There are some countries, though, where doubts subsist, such as Japan, Korea and Saudi Arabia, which uphold requirements of nationality and/or residence for a person to serve as arbitrator. Saudi Arabia also requires arbitrators to be male and of the Islamic faith. These all seriously restrict the choice of arbitrators in an international dispute and are likely to discourage foreigners from fixing the site of the countries.<sup>823</sup>

In certain types of arbitration the participation of a group of lawyers who work together is required. It is not possible independent counsel to defend the client in these cases. The group of lawyers brings different expertise, experience, languages, ways of thinking, and may even belong to different legal systems. As stated by Jesus Olavarria, needs have led to professional societies, either of lawyers, technicians or other branches of industry, which has been put on show by some sectors of the doctrine but has led, in some cases, favourable results for their clients.<sup>824</sup>

#### 5.15.4. Size of the Arbitrations.

These analyzed arbitrations are definitely big. The magnitude of these procedures, compared to those normally present in Mexico, may be characterized by reference to: (i) the number of people involved, (ii) the number of documents that have been filed, (iii) the number of conflicts to be resolved, among other things.

We have to refer back to the CONPROCA Arbitration. In this arbitration, for example, hundreds of people participated. This follows from the testimony of several respondents:

*LJCHG. "Cuando fuimos a hacer la inspección... ocular de la refinería y de una estación de bombeo, ¡¡fuimos 70 personas!! entre peritos de ellos, ellos traían firmas de ingenieros por tema, despachos de abogados por tema o por tema traían 4 despachos ..."*

<sup>823</sup> Jarvin, Sigvard, Op.cit. footnote No. 507, pp. 59 - 60.

<sup>824</sup> See Olavarría Iglesia, Jesús, Universitat de València, "Del Ejercicio Individual al Ejercicio Asociado de la Abogacía: Razones de la Transformación", "Derecho y Sociedad", (coordinadores) María José Añón, Roberto Bergalli, Manuel Calvo, Pompeu Casanova, Titant lo Blanch, Valencia, 1998, pp. 584.

**CRGV. “¿Podríamos hablar de números más o menos de 300 personas?”**

SFG. “¡¡Quizás más!! Si en PEMEX estamos pensando que serían 150 en total entre internos y externos, yo diría que los de la contraparte por lo menos son el doble.”

**CRGV. “¡Entonces unas 300 digamos más los de PEMEX, fue un arbitraje de 450 personas más o menos!!”**

SFG. “¡La cantidad de testigos es increíble!!”

VMLL. “¡Un ejército, un autentico ejército!! como peritos de partes se nombraron en éste caso por lo menos del orden de 6 ó 7 firmas de ingeniería que han participado.”

As for the documents, it has been interesting to know what was said by one respondent, because the volume of the involved documents has resulted in a disruption that even led to the loss of some of them.

LJCHG “¡Sí, tenemos una sola bodega, para guardar todos los documentos!! Pero ya aun así al ser un proyectos tan grandes, pues si hay documentos que se extraviaron que no encontramos.”

MYMP. “empezando por la demanda que son... como doscientas y algo... la carpeta inicial... **Doscientas y algo.... Carpetas? ¡Wow!!** ¡Sí... tenemos miles de carpetas... carpetas de este ancho.... entonces es un volumen de información que te pierdes...”

Finally, as for the number of conflicts to be resolved, in the same CONPROCA arbitration, one respondent commented:

**CRGV. ¿Cuántos pequeños arbitrajes digamos se podría hablar dentro de éste arbitraje?**

SFG. “Muchos, pues el arbitraje se puede conceptualizar como dividido en varios tipos de reclamaciones. En las reclamaciones que tenían que ver con cobro adicional pues ahí hay miles de reclamaciones individuales **¡Ok!!** y el rango de los montos involucrados van desde unos pocos miles de dólares hasta millones de dólares **¿en cada uno de estos?** sí en esas miles de reclamaciones porque estamos hablando de miles y miles de reclamaciones ... entonces estamos hablando de muchos arbitrajes ¡¡cuántos no te se decir yo diría cientos!!”

As for the other arbitrations that have occurred in PEP, the people involved are less, but they are still significant quantities, for example, the area manager told us:

CEDM. “Lo que sí le puedo decir por ejemplo es que hasta personal interno de PEMEX, hasta 25 personas han participado, si contáramos los despachos jurídicos externos podrían ser fácilmente otras 10 personas y en los despachos técnicos otras 10.”

#### 5.15.5. Amount of Dispute.

The amounts of disputes in PEMEX arbitrations have been extremely high. In fact one of the arbitrations, the CONPROCA Arbitration, was, according to one interviewee, LJCHG “*el asunto más costoso que tenía o de más alto monto el gobierno mexicano*”. It is important to recognize that many of these cases start with an amount not so high and they turn into a snowball that grows over time. In this particular case, the CONPROCA arbitration, coupled with the claims of the plaintiff and the defendant’s, turned to be a dispute with an amount of 1,600 million dollars. According to this interviewee:

LJCHG. “*Bueno te voy a hablar ya del número en el que casi litigamos todo el tiempo porque al principio ellos nos demandaron por una pequeña cantidad, PEMEX reconviene por otra, y luego ellos vuelven a entonces elevar su monto pero estábamos hablando todo el tiempo ¡Se hizo una bolita de nieve!! ¡Estábamos hablando ahí todo el tiempo de PEMEX 900 millones de dólares que reclamaba!! Ok con IVA y ¡ellos 700 millones sin IVA!...*”

As for the other arbitrations analyzed, where a party was PEP, we collected the opinion of a PEMEX manager and one of the contractors, who commented as follows.

CEDM. “*Bueno el mayor fue de 400 millones de dólares ... otro era de 214, otro era de 120 más o menos ¡Ok!! sí la memoria no me falla así estaban, otros arbitrajes han sido por menos dinero, por ejemplo los que tengo actualmente son como 5 millones de dólares que en realidad ahí no se justificaba la cláusula de arbitraje pero por alguna razón estaba incluida en ese contrato.*”

CRS. “*¡Son como 270 millones de dólares!!*”

#### 5.15.6. Object of the Conflict.

The most common causes that generate controversy in PEMEX and its subsidiary bodies that have been subject to arbitration can be categorized in the following areas: (i) acquisition and public works, mainly for refineries and pipelines, and (ii) marine oil platforms. Great expectations are taken into multipurpose contracts or integrated contracts<sup>825</sup> that will generate potential conflicts.

It is important to note that sales of oil did not come within this classification due to the oil marketing scheme that PEMEX has gotten. PEMEX sells oil to a subsidiary named PMI. So, the business of selling oil is carried out exclusively with PMI, who in turn do business with the rest of the world, whether domestic or foreign customers.<sup>826</sup>

#### 5.15.7. Contextualization of the Arbitrations.

In the last years, important changes have taken place in Mexico. They have been the frame to the arbitrations commented in this part of our work. In particular, it is important to

<sup>825</sup> See supra pp. 238.

<sup>826</sup> See infra pp. 228.



mention the change in the power that we experienced in the year 2000, where the Institutional Revolutionary Party (Partido Revolucionario Institucional (PRI)) stopped governing and the National Action Party (Partido Acción Nacional (PAN)) took the power.

On the other hand, the economy in Mexico experimented a greater opening to the international markets, which has represented a growth in the Gross Domestic Product (GDP) of the country; nevertheless, this growth has been subject to plans and programs that lack a vision of long term. The previous thing has represented an obstacle to reach a greater economic and social development. Mexico continues counting on a great extent of natural resources.

From the social point of view, the security of the population has been affected as a result of a program against the drug trafficking and of the actions of the organized delinquency, which, has also been a remarkable brake for the development of this country. New practical and modernization principles have been settled down in Mexico but not with the desirable reach, since the opening to the external capital is still restricted in many relevant sectors of the economy.

Specifically in the matter of Oil & Gas, a modernization program in the exploration and exploitation of oil resources has been implanted, without getting favourable results to the date. Thus, in 1996, PEP undertook a project called “modernization and optimization of the infrastructure of the Cantarell field” which involved the building of new infrastructure and subsea pipelines for the transport of hydrocarbons, as well as the global modernization of its oil and gas production facilities complex located offshore in Campeche, Mexico, known as the Cantarell Field. The Cantarell project was designed to incorporate additional reserves of oil and gas, the use of gas produced in association with oil and the increase production of oil and gas. PEP divided the project in about 64 model contracts in charge of engineering, procurement and construction (EPC). Bechtel Corporation<sup>827</sup> and the Mexican Petroleum Institute (IMP), a branch of PEP, prepared the design, preliminary engineering and conceptual scope of each of the contracts, as a guide for contractors to develop detailed engineering.

## **5.16. The Interviews (Qualitative Results).**

As it has been previously commented, the quantitative method has been the fundamental base of our field research. Chapter I of this paper deals with the methodology to be used as well as with the interview plan to follow. This plan contemplates the name and curriculum vitae of the candidates to be interviewed, as well as the importance of their selection. Next, the obtained results of this work are mentioned.

### **5.16.1. Research Lines.**

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<sup>827</sup> Bechtel Corporation (Bechtel Group) is the largest engineering company in the United States, ranking as the 5th-largest privately owned company in the U.S. Its headquarters are in the Financial District of San Francisco. As of 2010, Bechtel had \$30.8 billion in revenue and employed 49,000 workers on projects in nearly 50 countries.

We mainly focused our work in two research lines: the perception of ADR in PEMEX and Obstacles to PEMEX-Arbitrations. Below there is a graphic that is pretended to show the sub-lines in which the research lines were divided.

Research lines	Research sub-lines
Perception of ADR in PEMEX	Litigation influence on ADR
	Lack of use of Mediation
	Lengthy and expensive procedures
	Judges' ADR perception
Obstacles to PEMEX-Arbitrations	Corruption
	Foreign arbitrators
	Lack of knowledge of Applicable Law
	Fear of the Comptroller to negotiate or mediate
	Politicization of the Arbitrations
	Subordinate positions
	Job rotation (Group Heads and Managers)
	Lack of Training
	Lack of an internal specialized area
	Cultural Differences in Arbitrations
	Misleading decisions thru the proceedings
	Economic personal interests

### 5.16.1.1. Perception of ADR in PEMEX.

#### 5.16.1.1.1. Litigation Influence on ADR.

As mentioned by Kurkchiyan, if the role of law depends on the social environment in which it operates, then it will not be the same from one country to another.<sup>828</sup> In Mexico, lawyers, entrepreneurs and judges are used to resolving disputes by using the traditional method, it means, court administration. So, there is a clear influence of litigation before court when dealing with ADR. Twenty years ago, when it was hardly mentioned the word arbitration, at least for fields not related to sports, there was not another option but appearing before a court to have a dispute resolved. Then, little by little, as it was already mentioned, as consequence of the NAFTA and the subsequent law modifications, arbitration appeared on the Mexican map, and the future is to expect that mediation and other important ADR will do the same.

However, we must recognize that there is an influence on the way litigations are conducted before state courts in some of the Mexican attorneys participating in arbitrations. Even we believe such an influence can be noticed also in some arbitrators. The reason why this happens, we believe is the lack of training. If we talk of mediation, we would think that it is possibly that labour lawyers are more used to a negotiation, then, could they have an advantage over a commercial lawyer; however, in practice both areas are very different and usually lawyers who are dedicated to commercial arbitration or mediation in Mexico are

<sup>828</sup> Banakar, Reza and Travers, Max, Op.cit. footnote No. 747, pp. 263.

either litigants or corporate lawyers. In this regard, we quoted the words of one interviewee, Jose Antonio Rodríguez Marquez, “Englishmen say that arbitration worked till lawyers came to spoil it”, the same interviewee brought up as mentioned by Luis Miguel Diaz, who said that “to be a mediator, he was also a lawyer”, and that “to be a mediator one must unlearn what learned before”. We also believe this can apply also to arbitration since we are not in a court case. We believe they are malformations that could be corrected, because somehow, unfortunately, are affecting mediation and arbitration in this country.

#### **5.16.1.1.2. Lack of Use of Mediation.**

While it is considered that the ADR industry is relatively new in this country, we must recognize that this development mainly refers to arbitration, as mediation and other ADR have had an almost non-existent application. Chapter II of this work refers to the variety of ADR in the world, which have been developed and used by many countries around the world, with USA and England the most widespread. In Mexico, we could say that development has meaning only for arbitration, setting aside the mediation and other mechanisms. After the field research, we realized that sometimes, there is even confusion between mediation and negotiation. With the understanding that the first involves a third party that gives a view of the problem, which is not binding on the parties, and the second is a solution reached by the parties, either personally or through their legal representatives.

Below there are some testimonials that verified that mediation is not in use as a method for resolving disputes in PEMEX,<sup>829</sup> highlighting the main cause as the risk and fear of the government staff, later on discussed in another subsection of this work, as well as the conviction that it is not a satisfactory mechanism for resolution:

**CRGV. “Entonces al día de hoy ¿usted no tiene conocimiento de que haya existido alguna mediación, ...?”**

*JGGF. “No, no no.... mediador no, la figura como tal no la conozco, no tengo conocimiento de que se haya dado o de que se esté dando, ..., la mediación también si la ejerce uno, puede ser mal vista en un momento determinado como servidor público., porque bueno hay muchos factores no escritos que también juegan un papel muy importante.”*

*CEDM. “... no tenemos procedimientos de mediación. Con las nuevas reformas a la ley de petróleos pues si hay la necesidad de establecer, los medios de solución de controversias que consideramos convenientes y entre ellos estaría la merición....no perdón la mediación, pero creo que tampoco ha sido muy acogida por las áreas de contratación.”*

**CRGV. “Claro y cree que funcionaría?”**

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<sup>829</sup> There are not mediations in the Mexican energy sector. One interviewee was a senior official responsible for the administration of legal proceedings in CFE, in order to make a brief comparison between CFE and PEMEX, and commented about: GZO. “en CFE se utiliza más que nada el arbitraje, no hay, no existe el mecanismo de la mediación”.

*CEDM. “No estaría tan seguro, dado que en mi opinión muchas de las empresas que se da el arbitraje cree que conciliarían mayores prestaciones en algún procedimiento arbitral, que en una mediación.”*

However, it is important to mention that one of the interviewee, who is a technician and not a lawyer, and that has been involved in arbitration proceedings for more than 10 years, gave a very interesting answer on this subject matter, which leads us to conclude that their experience rather than training, has led her to think of mediation as a mechanism that can be used in large projects to unlock future situations that could lead disputes to be subject to arbitration, with which we fully agree:

*MYMP. “¡¡A mí me parece que sería un tema interesante el llevarlo a cabo!! [utilizar mediaciones para resolver conflictos que se vayan presentando en un proyecto] Por qué? porque entonces no estás llegando ya al ¡¡enorme gasto que vas hacer en un arbitraje o en la propia justicia ordinaria!! entonces ya cuando tienes muchas controversias es durante la ejecución del proyecto (sería recomendable) tener un equipo de gente legal-técnico ya sea de la propia institución o un tercero el que te ayude a poder destrabar durante la ejecución del proyecto, todos los temas en donde por alguna razón no quieren contestar los funcionarios o los contratistas y entonces, poder tener el beneficio de que en ese momento solucionas y ese ya es un escalón menos.”*

We realized that contractor companies which deal with PEMEX have not used extensively mediation or any other ADR either. In this sense, it was the answer of the legal director of a PEMEX contractor whom we interviewed:

*CRS. “No, no se ha usado, la mediación no la hemos utilizado en ninguno de los casos que llevamos en [la empresa] .... yo ahorita me estoy acordando que tuvimos un caso, no de mediación con PEMEX si no fue de..... ¡¡Miento si fue de mediación!! que designamos a la Comisión Reguladora de Energía ¡¡ah ok!! como mediador en un tema donde teníamos diferencias de mediciones, ahorita me acorde de ese caso ¡¡que es el único que hemos tenido con ellos!!.”*

Why is mediation and other means of dispute resolution other than arbitration not used in PEMEX? The answer is related to some issues discussed below which have been considered as obstacles to the use of ADR, especially the fear of the comptroller, the obligation to respect the employees subordination to their superiors, among other things. Here there are some views of respondents.

**CRGV. “Para PEMEX y sus organismos subsidiarios, ¿es posible negociar una controversia o se requiere siempre de una resolución oficial de la misma?”**

*JGGF. “Bueno, nuestra legislación nos permite siempre llegar a una transacción del Código Civil Federal, así lo establece, el llegar a una negociación antes de obtener una resolución final, está prevista en nuestro Código Civil Federal, sin embargo en el sector público como lo es el de Petróleos Mexicanos y sin lugar a dudas el de los Organismos Subsidiarios, nos encontramos con distintos factores.*

*Primero, la gran cantidad de regulación interna, bajo la cual estamos sumidos los servidores públicos, el llegar a una negociación antes de obtener una resolución implica también que existan factores determinantes para que el servidor público que tenga que asumir la responsabilidad de firmar pues sean contundentes y no haya lugar a duda de que se está llevando una buena negociación, sin embargo y lamentablemente hay áreas dentro de Petróleos Mexicanos que no lo ven así, lo ven eh... ¡¡pues para qué firmo ahorita si mejor me espero a que haya una resolución!!, ya la posible responsabilidad, que yo pueda tener al firmar un convenio de negociación o de transacción antes de que la autoridad se haya pronunciado, pues se diluye al momento de que se emite una sentencia y el cumplimiento de ésta sentencia desde luego que no me va o no le llevaría al servidor público ninguna responsabilidad, puesto que no estaría siendo un cumplimiento de una resolución judicial Claro.*

*Esta forma de pensar muchas veces nos impide a nosotros como abogados el llegar a convencer con el área operativa de tener la posibilidad de solucionar el conflicto a la brevedad y no esperarse a que se obtenga una resolución, para que en cumplimiento esa resolución se tenga que cumplir en el término, lamentablemente, repito el esquema no está siendo analizado desde ese punto de vista como en otras áreas y definitivamente nos dicen no... no hay arreglo espero que venga la resolución y entonces si la complementaríamos.*

*Nuestro argumento principal es que cuando venga esa resolución habrá pasado tanto tiempo que el costo-oportunidad se nos va de las manos y en lugar de pagar 10 que podemos pagar ahorita, tendríamos que pagar 15 o tendríamos que pagar más, sin embargo, bueno se anteponen ante estas circunstancias, las circunstancias personales y no las del beneficio para la empresa.”*

*CEDM. “si no es vinculante cualquier decisión que tome uno como funcionario público puede ser observada, los propios procedimientos internos de solución de controversia no han sido muy efectivos. Porque aunque tu veas que el otro tiene la razón a ti te van a medir tu resolución bajo otros distintos parámetros a los de los jurisdiccionales de usos de recursos públicos, también hay cierta.... de concederle sus peticiones al contratista, así lo veo yo no.”*

**CRGV. “¡¡Si coinciden, todas las personas que he entrevistado coinciden eso, que hay una responsabilidad del servidor público que se limita muchísimo a tomar decisiones de negociación!!”**

*CEDM. “Sí, de negociación, entonces por eso nuestros ADR como método de solución de controversia no han funcionado mucho, pero tendrían que liberarnos.”*

#### **5.16.1.1.3. Lengthy and Expensive Procedures.**

With respect to the fact that the procedures are long, we must start saying that one of the supposed advantages of arbitration, perhaps the most important after the flexibility of the process, is the short duration of the process. Unfortunately, the experience that PEMEX has had in arbitration proceedings has not been good in that respect, because the average time used in these mechanisms is high. Particularly, it is worth mentioning the case of a procedure that is currently in progress and which amount has raised the most important

arbitration filed in the history of arbitration in Mexico, and even one of the most important in the history of ADR in the world.

This procedure has lasted over 10 years. The important question to address here is why it has lasted so long? From the interviews we can take several scenarios, ranging from mismanagement by lawyers who charge an hourly rate, and who have extended the procedure as long as possible, as well as the lack of organization by the arbitral tribunal. Other scenarios are the lapses that occurred in the procedures for alleged negotiations between the parties to end the dispute, the excessive number of documents submitted by the parties which led to a delay in their analysis, and the dilatation attitudes of the procedure taken by the parties. The truth is that, anything which has been the real reason for the delay, a procedure lasting more than 10 years is not a healthy way to resolve a conflict, and it will obviously influence the parties for not wanting to use this mechanism in the future.

Here, there are some answers transcribed as for the duration of this procedure, as mentioned, it has had no precedent in the history of arbitration in Mexico.

*LJCHM. “¡¡la duración!! La duración del procedimiento ¡¡Que creo que si ya hablamos de ella ha durado muchísimo!! Por diversas causas, nosotros por el tema de cambio de funcionarios, por el tema de querer negociar, lo detuvimos en varias ocasiones y creo que ellos también en varias ocasiones por el mismo tamaño del asunto no...”*

*CRGV. “¡¡O sea fue culpa de todo el mundo digamos!!”*

*LJCHM. “¡¡Pues sí, culpa de todo mundo y del tamaño del asunto!!”*

As for the cost of arbitration proceedings, we also want to bring as an example that huge arbitration which cost has been very high for the parties involved. This brings uncertainty to another advantage of arbitration which is supposed to be an economical procedure. The costs of this arbitration, without considering any condemn of the award, are presumed to be around the figure of 40 million dollars in total for PEMEX<sup>830</sup> and it has been speculated that the counterparty has spent about 100 to 120 million dollars, which results of a total cost for both parties of 160 million dollars.<sup>831</sup>

As for the duration of the other procedures in which PEP has been a part of, we could say that they are procedures within the range of 2, 3, 5 and 7 years. This last one including two years of proceedings for recognition and enforcement of arbitral award. In terms of cost, as we were informed and without evidentiary items, we mention that it comes to procedures which costs have ranged from low cost to 12 million dollars, also considering legal fees, expert fees, witnesses fees, payment to the administrator, hearings and other expenses,<sup>832</sup> and without considering any condemn in the award.

<sup>830</sup> (i) 20 million dollars in legal fees to defend PEMEX, (ii) 5 million dollars in fees for the arbitral tribunal, (iii) USD\$500,000 for expenses on hearings, (iv) 2.5 million dollars in fees for the administering institution, (v) 13 million dollars for experts.

<sup>831</sup> We make clear that this information came from interviews without having access to the official source.

<sup>832</sup> Expenses afforded by PEMEX only.



Finally, we transcribe the relevant part of two interviews that relate to the issue of arbitration costs, the first of a PEMEX official citing a policy for hiring external law firms and the second of a defense attorney of a PEMEX contractor that indicates the fees that can cost Mexican and foreign lawyers, denoting a mismatch between them:

*CEDM. “No, en juicio nosotros tenemos nuestro propio jurídico interno que nos defiende de juicios o juicios jurisdiccionales en materia de arbitraje se dio la tendencia por ser una materia muy novedosa fue también de que fuera atendida por despachos externos.”*

*VMLL. “Perdón, a veces hasta más Carlos, digo hay personajes digamos de las firmas americanas que su hora está en el orden de 800 dólares. Yo el abogado.... digo nosotros, estaríamos pues bastante más abajo, máximo estaríamos entre los 300 y 350 dólares, hablando de un socio de un despacho mexicano.”<sup>833</sup>*

#### 5.16.1.1.4. Judges’ ADR Perception.

We estimate that in Mexico judiciary is used to resolving disputes of civil and commercial nature. When an oil & gas dispute arises, the situation changes. First, they are conflicts of very high amounts not common to the federal courts. Additionally, we believe that Mexican judges, those of the federal jurisdiction, do not have an expertise in that subject matter, not even a general knowledge to deal with oil character conflicts. They might have, in our opinion, some experience in matters of acquisitions or public works. However, and supported by the results of the field research, the Mexican federal courts lack the expertise required to adequately resolve conflicts on issues of: (i) oil exploration or exploration, (ii) use of sea platforms for oil extraction, (iii) sales of first-hand, or any other issue that require this level of expertise.

A few years ago, more than 20 to be exact, we would said that Mexican judges did not even know the term ADR and certainly many of them thought that arbitration was only used for football games.<sup>834</sup> Fortunately, today the Mexican judiciary is doing good team with arbitrators and is much more accustomed to these mechanisms. As evidence of this assertion, it is mentioned the comments of two interviewees on this respect.

*JARM “qué tipo de resolución han emitido los tribunales respecto al arbitraje en términos generales, las resoluciones de los tribunales respecto a los arbitrajes son buenas, o sea nos hacen un foro amigable al arbitraje. Tal vez al principio pues no éramos tan amigables. Como anécdota personal en un arbitraje hace muchos años, me pidieron en un arbitraje internacional, que el lugar del arbitraje era México, me pedía el juez que demostrara la existencia de la convención de Nueva York, no me han vuelto hacer esa pregunta, pero bueno a ese nivel estábamos, estábamos iniciando la actividad arbitral en México.”*

<sup>833</sup> It can also be considered as a cultural difference.

<sup>834</sup> In Spanish “arbitraje” is the term used for both: the legal proceeding and for “sport refereeing”.

SFG. *“los jueces más o menos están cada día más pro-arbitraje, más conocedores el arbitraje por lo menos en la Ciudad de México, Guadalajara y Monterrey.”*

### 5.16.1.2. Obstacles to PEMEX-Arbitrations.

#### 5.16.1.2.1. Corruption.

Corruption is the great disease suffered in developing countries and it has been the main obstacle for them to reach an expected development. Latin American countries are not exception to this rule and we see that Mexico, as one of them, has suffered this evil. Corruption is a phenomenon which, to one or another scale, can be seen in all levels of the Mexican economy and politics. We must also recognize that a great effort has been made to combat this disease and we cannot generalize that all public servants are corrupt.

In the case of PEMEX, it is a sensitive issue, but existing. Thus, as a result of the interviews, we realized the existence of corruption in the process of arbitration in which PEMEX has been a party of. We do the clarification that, being a sensitive issue, we simply transcribe what was obtained from the interviews and was mentioned by some people, without being able to guarantee the veracity of the statements.

The information obtained reflects the two sides of the coin. On the one side, the fact that it is recognized that corruption has affected the conclusion of contracts subject to arbitration and the development of the arbitration proceedings themselves. On the other side, that many people think that everything in PEMEX is corruption when in fact there are also honest officers doing their job and are covered by the shadow of corruption while they are not part of it. An example of this was mentioned by a PEMEX official, referring to the limitation of teamwork in arbitrations.

*LJCHG “¿¿como llega mucha gente tristemente a PEMEX, que piensan que aquí todo es corrupción, robo, ineficiencia!! y entonces en lugar de hacer equipo y decir ¿¿Señores como defendemos este equipo!! pues no se hizo para nada.”*

Below there are some testimonies thru which one clearly perceives that there was corruption in the process of administration of contracts which were later on subject to arbitrations. A culture of tacit acceptance of the claims of the counterparty is recognized, without analyzing fully the source of these claims, which shows that there were economic benefits to some officials, regardless of the damage done to the institution; as well as the fact of hiding the truth at all costs during the development of arbitration proceedings.

#### **CRGV. “¿Y en este arbitraje en particular si notaban mucha corrupción?”**

*JCYPS “En la obra ¿¿No en el arbitraje tan claro, en las obra si¿¿ en la obra hubo corrupción ¿¿En la obra si!! esa corrupción trajo al final de que... en un momento dado crearon unas expectativas a una de las dos empresas... a las dos empresas.”*

*JCYPS “Primero... porque había una cultura de aceptación de reclamos, ya habían aceptado reclamos con estas mismas fallas **¿¿Cultura en PEMEX de aceptación!!**”*

*cultura en PEMEX y ya hasta la contraloría ya lo observó y ya están en pleito por esos reclamos que aceptaron, se hicieron precios internos extraordinarios mal hechos...”*

**CRGV. “¿Y porque fue eso por ignorancia?...”**

*MYMP. “¡¡no, no, no.... aquí en PEMEX no hay ignorantes ¡¡jejejeje!! la misma palabrita... “corrupción”... “corrupción” o... el que es muy inteligente dice no.. no es “corrupción” es un mal acuerdo para evitar un buen pleito ¡¡jejejeje!! que bueno... me parece muy bien”*

*JCYPS “¡¡Cuando está la palabrita “corrupción” en medio, crea esos problemas!! ¡¡Ah no, no, no tú no platiques con él!! esto déjame a mí tú no te metas ¡¡a ver qué dice aquí... pero le hago así... no le enseño esto... qué dice ahí... por qué... porque no quiero que sepa la verdad, por qué... porque estoy haciendo algo malo!!”*

*MYMP “Entonces no dejaban que interactuáramos nosotros y los peritos menos, a mí me dijeron cuando me entrevistaron finalmente ¿y dónde estabas tú?... pues yo siempre he estado ahí... pero es que no nos dejaban hablar con ustedes tan simple como eso...”*

*JCYPS “¡¡Nosotros no dijimos la palabra “corrupción” en ninguna audiencia!!”*

**CRGV. “¡¡Pero todo mundo la pensó!!”**

*JCYPS “¡¡Pero se veía por todos lados!!”*

*MYMP “Los 600 millones de reclamo de CONPROCA tiene una “C” de “corrupción” tremenda lo pagado, lo firmado y lo no firmado todos... porque son 630 de reclamos mas lo pagado que fueron 61 millones ¡¡Todo tiene muchos problemas graves de corrupción!!”*

#### **5.16.1.2.2. Foreign Arbitrators.**

The issue of people who have served as arbitrators in arbitration proceedings in PEMEX is also a sensitive issue. The impression we have, after completing the field research, is that in some cases it could be presumed that the fact of appointing arbitrators with a different nationality other than Mexican, has led to a “different” analysis of Mexican legislation carried out by arbitrators who had not legal education in this country. This does not mean that foreign arbitrators are incompetent or unprofessional, in fact many of them have a very important international recognition that they have earned and showed it in their performance.

Our comment in this regard is that, from our very personal view, the intervention of foreign arbitrators in arbitration proceedings where the merits of the case should be resolved entirely with Mexican laws is not justified. We believe that any good lawyer can have a good knowledge of foreign law if he/she gets to study deeply, but the legal culture resulting from having studied in a specific legal system and the experience of dealing with such a

legislation, gained only by the passing of the years, cannot be easily acquired by an attorney of foreign nationality.

In Mexico, as recognized by this respondent, there are excellent lawyers who really know about the legal framework and are not named as arbitrators, either because they do not belong to that small group known as the “Toby’s club” of which we refer later on, or because the arbitration clauses are poorly worded requiring unnecessary requirements, as happened in one of the arbitrations where it was necessary for an expert to have “international publications”, which was a real obstacle to the arbitration.

**CRGV. “¿Y finalmente los que participaron, tuvieron buena participación desde su punto de vista?”**

CRS. “No, ¡ni siquiera!! en realidad el que sabía era uno de ellos, que los otros pues digo a lo mejor tenían el conocimiento en materia de gas y a nivel internacional, pero vamos desde mi punto de vista nada mas el presidente del tribunal fue el que ¡resolvió!! en realidad era el que llevaba además como presidente se ve que tenía el conocimiento y la habilidad para poder establecer criterios y adecuar a las partes no... ¡¡jubicarlas!!”

**CRGV. “¿Eran mexicanos los tres árbitros?”**

CRS. “¡¡No, no, no, eran latinoamericanos!! Portugués... perdón, brasileño, argentino y chileno.”

**CRGV. “¡¡Y ninguno mexicano!!”**

CRS. “¡¡Ninguno mexicano!! y el problema aquí, bueno no sé si haya una pregunta más adelante ¡no, no, no, adelante, adelante!! fue que precisamente las pocas personas en México que pudiesen reunir ese requisito de las cláusulas arbitrales eran abogados especialistas en derecho de Energía mexicanos y ninguno de ellos como no figuraba dentro de las... yo les llamo de las primadonas del arbitraje en México<sup>835</sup> ¡¡totalmente de acuerdo!! pues eh... no fueron aceptados.”

CRS. “Sí afectó porque ello motivaba a que siendo los árbitros ignorantes del derecho mexicano, tuvimos que incurrir en el gasto adicional de contratar a un abogado especialista en derecho mexicano para que entrara como experto a desahogar su punto de vista sobre el caso, cosa que se hubiera evitado si los árbitros fueran mexicanos y conociesen el derecho mexicano.”

**CRGV. “Sin decir nombres obviamente ¿usted podría decir si a usted le solicitaran un árbitro con esas características si podría existir no?”**

CRS. “¡¡Si pudiese existir!! lo que pasa es que si esos abogados, algunos de ellos no han hecho publicaciones a nivel internacional ¡¡claro!! pero en el ámbito de territorio nacional y algunos países de Latinoamérica son expertos y tienes la experiencia del tema, en México y han participado inclusive en la elaboración de la

<sup>835</sup> Refers to what is later called as members of the “Toby’s Club”.

*Ley o han participado dentro del órgano regulador y hoy son postulantes, etc. ¡¡claro!! o sea si hay poca gente pero si la hay ¡¡si existe!! Si la hay.”*

In this regard, we should mention another major problem that is evident in Mexico, which is “the Toby’s Club”, known as the small group of those lawyers in Mexico who have achieved a monopoly on arbitration cases.

As it was commented by one interviewee, it is very common in Mexican arbitrations to see a person acting as an arbitrator with a “supposed” expertise in a branch of law to resolve a case and later on, to see the same person with another “supposed” expertise (totally incompatible with the first one) while resolving another case. This issue was directly criticized in a session of the ICC, where the participation of Mexican arbitrator in an arbitration was being approved, since the presents to that meeting stated that the phenomenon of being “experts” on various and different branches of law only happened in Mexico.<sup>836</sup>

We believe that the issue of appointment of arbitrators in PEMEX Arbitrations is an issue that deserves more careful and that, up to date, it has been conducted more guided in an alleged reputation or even personal interest, rather than choosing a candidate with real expertise and knowledge of the applicable legislation. This personal opinion is also applicable while selecting the defense lawyers.

*DUOC. “¡¡El arbitraje al contrario debe de ser popular, no aristocrático!! o digamos como se conoce en México y en el mundo, del Club de Toby, en donde los árbitros y los abogados, pues se han dado casos que hasta del mismo despacho, o con relaciones de negocios, o donde un mismo árbitro es a la vez, árbitro, abogado, juez, experto, bueno.... eso digamos en pleno siglo XXI, parecieran situaciones que se daban en épocas de las cavernas..”*

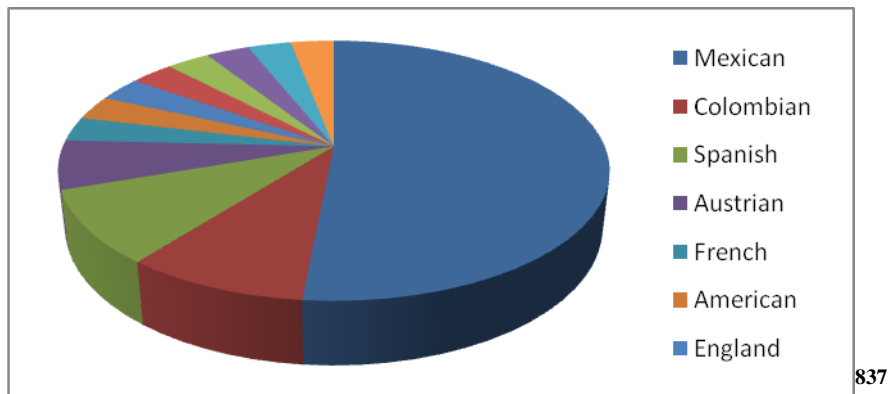
Many arbitrators, foreign arbitrators, what they do after having being appointed in an arbitration where Mexican legislation is applied, is simply to ask for the opinion of “an expert on Mexican law” and with that they resolve those gaps. Obviously we do not think that is the solution. They should be experts in Mexican law which is applied to the merits.

*JARM ¡¡Exactamente, o los mismos abogados!! O sea también me ha tocado como árbitro que de repente pues te presentan un cuestionario de preguntas... sensacionales las preguntas, ahora busquen al perito claro.”*

We believe it is very important to establish in arbitration clauses that persons acting as arbitrators must be experts in the substance of the dispute, and preferably Mexicans. The case of accepting the participation of foreigners to serve as arbitrators, can only be accepted when the situation so requires, as in the case of an international dispute in which the interests of foreign parties are involved, as it is the case of international contracts where local experience is not required. Below there is a graphic where the nationality of the arbitrators who have participated in PEMEX arbitrations is shown:

<sup>836</sup> The comment was made in the year 1998, while I was doing a “stage” in the ICC.

### Arbitrator's Nationality



#### 5.16.1.2.3. Lack of Knowledge of Applicable Law.

To address this point we make the division between lawyers who participate as party counsels and those who serve as arbitrators. In both cases, it should be strictly necessary to count on the total knowledge of the applicable law, as for the merits and as for the procedure.

Overall, we deem that in Mexico, there is the belief that being an “expert in arbitration” gives you enough knowledge to be a good arbitrator or a good defense lawyer. However, we believe that the important thing is, to have indeed a good knowledge of the arbitration proceedings, but more important is to have full knowledge of the applicable law to the merits. From the interviews, we drew the conclusion that this has not been always present in the PEMEX arbitrations, as some respondents considered that there was lack in the knowledge of lawyers and arbitrators who intervened. This point is related to the nationality of arbitrators referred to in the preceding point, since it is a consequence of not having a legal education in this country. However, because of its importance we decided to make the separation of the subject for purposes of this work. So, what was mentioned by some respondents explains itself the lack of knowledge of the law in some cases and even the lack of procedure for appointing defense lawyers, which is strictly related, from our point of view, to the issue of corruption we have already made reference.

*LJCHG. “¡¡Muy súper conocedor él del tema de arbitraje!!”*

*MYMP. “Nuestros abogados (refiriéndose al mismo abogado que el anterior) tampoco conocían la Ley de Obra Pública, pero si conocían de arbitraje”.*

*JCYPS. “¡¡Nuestro despacho de abogados no tenía experiencia en obra pública!! tan es así, ¡¡No conocían la Ley de Obra Pública!!”*

<sup>837</sup> The source of this chart was the information gathered while doing the field research in PEMEX.



**CRGV. ¿y porque lo contratan, quien, cual es el proceso de contratación en cuanto a abogados, o de arriba?**

JCYPS. ¡¡Contraten a tal!! **Y punto...**

MYMP. ¡¡Yo ahorita y después de 11 años yo no contrataría a ese despacho!!  
**¡¡Bueno ahorita ya son expertos no!!** ¡¡Ya le pague su triple doctorado!! ¡¡Si.. si.. si...!!

GRYR: “Sin duda los abogados de éste grupo que casi podría decirse que es muy restringido porque son pocos, pues se reparten todos los asuntos importantes del arbitraje en México este y cuando llegan a participar en asuntos del sector energía, yo diría que no garantizan de ninguna manera que la solución final de éstos procedimientos pudiera ser la adecuada porque ¡¡No es suficiente tener conocimiento de la manera de cómo se debe interpretar una disposición jurídica si no es indispensable tener conocimiento más profundo de las actividades de la industria petrolera para entender cómo deben interpretarse las disposiciones jurídicas aplicables en ésta materia!!”

Here, it is important to mention the nationality of external consultants. In those arbitrations where PEMEX has been a participant, we found American, Indian, British, and Mexican advisers and on occasion, the most important case, the legal group leader was an American attorney. We believe that foreign lawyers can be powerful advocates, but we brought again the issue of the need of expertise on Mexican legislation. However, it should be recognized, that our American colleagues have good skills for presenting the facts, from which we should learn as well as from the use of techniques available at the common law system.

**CRGV. “¡¡Y le pregunto eso porque me llama la atención que un abogado extranjero pueda hacer una muy buena argumentación con una ley mexicana y que es muy nacionalista!!”**

VMLL. “Pero lo que pasa es que ahí lo que te quiero transmitir es que la argumentación que hace el abogado americano no está, digamos al final del día no solamente se traduce en un argumento estrictamente jurídico de la interpretación de la ley si no de exposición de los hechos, como se sucedieron los hechos, y como los prueba, como prueba que la otra parte dejo de cumplir ó incumplió el contrato y eso lo alega digamos esencialmente no interviene digamos el derecho ó la aplicación del derecho si no el alegato lógico, vamos a llamarle lógico, de cómo prueban los hechos.”

On the other hand, both lawyers and arbitrators must understand the nature of PEMEX because as one interviewee said, who is in a high position in the Mexican federal system, PEMEX is not a company, is a governmental entity, and it is not intended to maximize value.

JCZM. “Petróleos Mexicanos no tiene como objetivo maximizar valor **¡¡Ok!!** o sea fíjate de donde partimos y partimos al día de hoy no.... ojala esto fuera cambiando en

*el tiempo, pero al día de hoy ese objetivo de maximizar valor, no está ahí, al menos no con la claridad que lo tiene una empresa privada.”*

*¡¡Petróleos Mexicanos ni siquiera es empresa, Petróleos Mexicanos no es una empresa es una oficina del gobierno, legalmente no es una empresa!! no tiene capital, no tiene accionistas **¡¡No hay una especulación comercial!!** Petróleos Mexicanos no tiene el objetivo de crear valor ni siquiera en su Ley, su Ley te digo Artículo 7mo de la Ley de Petróleos Mexicanos no es claro el mandato de creas valor, entonces, eso es el marco legal, ahora en la realidad que es lo que vemos, yo lo que te puedo decir, yo como regulador lo que veo es que el comportamiento de PEMEX se explica.... está más explicado por indicadores de corto plazo, que es por ejemplo maximizar la coproducción de crudo, en éste caso en el corto plazo, que eso no es necesariamente con crear valores”.*

PEMEX has a very specific legal framework, it is not the same as that applicable to commercial companies. There are issues that have caused much controversy during the course of the arbitrations, as some people have argued the lack of knowledge, on the subject matter, by some arbitrators, who have confused non-arbitrable matters with arbitrable matters. This might bring the illegality of their decisions. There are those who recognize only the need for clarification by the Mexican courts in the matter. Specifically, we refer to the issue of administrative rescission of contracts, acts of authority, early terminations, among others. It is important to clarify that our role is not to determine whether they are or not arbitrable, we just want to bring to the table the fact of an alleged failure of the arbitrators to decide on issues that would correspond to the Mexican state courts and on the other hand, the need to clarify a position of the courts in this regard.

**CRGV. “O sea un poquito lo que estoy entendiendo es que, en algunas ocasiones los árbitros no toman en cuenta la naturaleza jurídica de PEMEX, de la institución y las consecuencias que esto trae. ¡¡Si la verdad es que yo!! o sea lo ven como un participante mas en el comercio y se acabo.”**

*CEDM. “Sí, lo que pasa es que PEMEX tiene un régimen jurídico muy peculiar es un órgano o una entidad de la administración pública federal, es un órgano descentralizado cuya administración está sujeta a derecho administrativo, ahora, los actos de la industria que son petroleros, extracción y explotación de hidrocarburos, refinación, elaboración de productos químicos se consideran por ley también, actos mercantiles **claro**, ok, ahora las contrataciones de PEMEX de obras, servicios y adquisición están reguladas por leyes de derecho administrativo, que están relacionadas con las actividades sustantivas que son mercantiles, pero a la vez son derecho administrativo **¡¡ahí mezcla de las dos!!** Entonces es un régimen incluso para los tribunales nacionales determinar qué acto en específico es mercantil o meramente contractual, por ejemplo determinar cuánto me debe o cuánto le debo al contratista lo cual es un acto de autoridad y desde hace unos 5 o 6 años la corte, por ejemplo en el caso de la rescisión ha pasado de considerarlo un acto mercantil a considerarlo un acto de autoridad, las terminaciones anticipadas también han pasado de considerarlo un acto mercantil a pasarlo a un acto de autoridad y creo que ahorita ya están marchando a otras figuras, como los finiquitos de contrato, la liquidación que se hace al final del contrato y una vez terminado el contrato para saber cuánto se debe para pagarse, como un acto de autoridad porque precisamente deriva de una*

recisión o de una terminación claro, nuestro derecho también ha sido muy ambiguo en calificar muchas de estas figuras, entonces también hemos tenido mucho problemas, tampoco hay jurisprudencia pero hay una tendencia a pasar del mercantil en estos tres actos a acto de autoridad, acto de autoridad y por eso en muchas ocasiones en los juicios ante tribunales nacionales hemos tenido sentencias muy contradictorias en las que nos considerara autoridad perfecta del amparo contra una rescisión o hay veces que sobresale el amparo porque es un acto mercantil contractual igual, entonces so también digo...”

**CRGV. “¡Es una línea muy tenue que a lo mejor!!”**

CEDM. “Que también toda esta ambigüedad pasa a los tribunales, cada quien está alegando su parte, tampoco se acaba de entender y lo toman como ellos siempre lo han tomado, como un acto mercantil **¡¡son mas mercantilistas no.... los árbitros!!** Así es, entonces también a eso me refería a la elaboración de los contratos **Ok** más detallados, porque a un contrato que pueda irse a arbitraje porque quizá muchas de las cuestiones que nosotros podamos alegar como soporte legal los árbitros no lo tomen en cuenta, entonces tenemos que ser mas detallados, en cuidar todos los derechos y las obligaciones de las partes claramente en los contratos.”

SFG. “Sin embargo hay problemas pues torales en la forma en cómo está la ley a todo mundo nos tiene preocupados el tema de la rescisión administrativa de los contratos el tema de la terminación anticipada y la rescisión administrativa, eso puede tener una solución muy fácil pero lo que está mal es que hay incertidumbre en la medida en que los dos casos lleguen a los tribunales y lo resuelvan de una u otra forma, el primer paso es tener certidumbre de lo que es el marco jurídico **¡¡claro!!** si llegan a decir que la terminación anticipada y la rescisión no son arbitrales y más bien cuáles son los efectos de esa no arbitrariedad, que significa eso en el sentido de que si un contratista se le rescinda el contrato necesariamente tenga que ir a tribunales mexicanos a disputar eso hasta el final hasta llegar hasta al amparo.”

SFG. “Y después el tema de si una vez que se determina que hubo, que no fue legitima la rescisión si los daños los tiene que pelear el tribunal mexicano o los puede pelear, una vez que se defina todo eso vamos a tener certeza si se define por el lado de que no es arbitrable en cuanto toca a la resolución administrativa, eso va a ser malo para el arbitraje en México, definitivamente eso va a ser malo la única solución si se llega a ese escenario es cambiar la ley. Si al contrario los tribunales decididamente dicen que esa ley se interpreta de una manera más flexible a favor del arbitraje y que si, que se puede rescindir los contratos, lo que no es arbitral es la potestad de estado de rescindir el contrato y que no se puede el tribunal arbitral arrogar la posibilidad de establecer un contratista pero que sin embargo si puede conocer de la las causas que dio lugar a su rescisión y de su legalidad conforme el contrato y la ley, si dicen eso pues va a ser bueno para el arbitraje, lo importante es que tengamos al tribunal en primer lugar y después que ojala que México digamos el sector se convenza de la conveniencia de quitar eso y hay toda una discusión ahí.”

SFG. “Creo que en ese sentido dentro de PEMEX hay amigos del arbitraje quizá el problema esté en convencer a otras áreas del gobierno en México para que se permita uno a PEMEX operar mas como una empresa privada especialmente en su contratación internacional y después me encantaría ver el mismo efecto a nivel de

*contratación local si el beneficio del arbitrajes se les da a los contratistas internacionales también debería de darse a los locales.”*

#### **5.16.1.2.4. Fear of the Comptroller to Negotiate or Mediate.**

Petróleos Mexicanos and its subsidiary entities are subject to a legal regime that represents a very strict control by the federal oversight agencies. Currently the Ministry of Public Administration<sup>838</sup> monitors in a very particular way the activities of the decentralized agencies and especially of the most important one in Mexico, it means, Petróleos Mexicanos and all its subsidiaries.

We were struck by the fact that one of the most representative obstacles we perceive in the application of ADR in PEMEX was a fear of the public servants to the comptroller, both internally and federal. In this sense, the question was asked to all interviewees whether it was possible for PEMEX to “negotiate” a dispute or if it was required a formal resolution. Surprisingly, all interviewees agreed that the method of negotiating for both, a department or a federal government entity, is acceptable to resolve a dispute. However, starting a process of negotiation with the federal government, and specifically with a decentralized entity such as PEMEX, seems to be very difficult. Particularly, it is important to mention that all interviewees felt that negotiations could bring certain level of responsibility for the public servant, since the signing of an agreement negotiated by a public servant could be a problem before the comptroller that sometimes could turn the situation into a significant detriment in his/her personal patrimony.

On the other hand, we must also consider that in many instances, the legal entities responsible for dealing with conflicts, internally within PEMEX, prefer a formal resolution than the non-mandatory opinion of a mediator. The formal resolution before mentioned could be that of a court, or even that of an arbitrator, regardless if it is favourable or not to PEMEX. They prefer this in order to support their decision and avoid personal problems. Internal organs of control, in the case of negotiations, inevitably make a detailed investigation to confirm it was the best option for the entity. Under this scheme, arbitration is protected in some way but it is a major obstacle to the development of mediation and negotiation and other ADR.

In order to illustrate the power that the Ministry of Public Administration can have on PEMEX officials, here there is a recent example on this issue. On October 11, 2011, news came to light concerning the dismissal of four members of PMI, including its Director General, María del Rocío Cárdenas Zubieta, who were dismissed, disqualified and punished with more than 500 million pesos (approximately 45 million dollars) accused on the sale of gasoline at a cheaper price to two international companies engaged in the purchase and sale of hydrocarbons.<sup>839</sup>

<sup>838</sup> Secretaría de la Función Pública.

<sup>839</sup> According to the note, there were irregular operations conducted in the period of 2008-2009 when the director of PMI International Commerce while serving as the Refined Commercial Director in the same entity. Cárdenas Zubieta was fined with MP\$283'942,000.00, while the former office manager of the Commercial Division of Refined, César Elías Covarrubias Prieto, was imposed a penalty of

Our view on this is that while we recognize that there is a high degree of corruption within PEMEX, we also believe that such exorbitant fines will not cure this terrible evil of corruption and that it causes, among the officials who actually do their job well, to install an unnecessary fear to sign documents in the exercise of their functions which could bring great economic benefits to PEMEX, such as negotiation or mediation as conflicts fasteners.

There are currently some guidelines for the out-court transaction of conflicts in PEMEX. These guidelines are more for a preventive use. PEMEX' officials are supposed to use them if there is room for negotiation, as long as it is for the benefit of the institution and it is shown that the cost and risk in a court trial or arbitration would be higher. According to the information obtained, these guidelines have been helpful and applicable in labour cases, but not much in commercial disputes. We believe the fear to the comptroller has made not to take advantage of these rules on trade issues.

Unfortunately, sometimes we, as Latin Americans, generalized about people who work in government, in this case in PEMEX, and we think that their behaviour is always outside the law. That is why most of the public servants are concerned and are greatly exaggerated with the issue of transparency. This follows from the conversation with some PEMEX officials:

**CRGV. “O sea que estoy viendo que la transparencia, ese es un elemento sine qua non en este tipo de asuntos verdad?”**

*LJCHG. “sí, sabes por qué, porque muchas veces este, bueno pues es triste decirlo, pero es sabido de todos, si el tema no es muy transparente, se presta a muchas suspicacias o como últimamente ya nos ha encantado el tema del sospechismo ... si no es muy claro el tema, alguien pensaría ... no será que estás haciendo una negociación incorrecta para la institución, o lamentablemente nosotros al ser gobierno tenemos que cuidar las finanzas del país ...”*

*JCYPS. “De ahí viene la idea de que podemos evitar llegar a un arbitraje o de una solución de un tercero, hagámoslo pero tiene que haber buena fe. Si hay mala fe y además hay problemas instituciones en todo lo que es los servidores públicos de que si pagamos de más, eso lo pagamos con nuestro dinero. Entonces se vuelve muy complicado que yo acepte a alguien pagarle un peso, si ese peso hay la posibilidad de que yo lo pague con mi dinero...”*

**CRGV. “¿O sea hay un miedo como servidor público en todo esto?”**

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MP\$85'068,654.00. The Deputy Director of Gasoline and Components, Alberto Olimon Salgado, was sanctioned with MP\$170'683,234.00 and the former Business Manager for Gasoline and Components, Alejandro Tello Winniczuk, with more than MP\$12'000,000.00. Following an investigation to the Department of Gasoline and Components at PMI, it was detected an excessive and unjustified discount on the sale of gasoline called “cóquer” in favor of the companies Trafigura and Gunvor. It was estimated that the damage to PMI International Commerce by a series of trade operations made by the officials punished amounts to 1.7 million dollars, while the damage to the parastatal is 24.3 million. <http://www.eluniversal.com.mx/notas/800283.html>.

JCYPS. “¡¡Sí, claro!! Pero... para los buenos y no para los malos es un mecanismo, para al que de buena fe quiere firmar una autorización de un reclamo y no detiene al que de mala fe paga un reclamo que no corresponde. Esa es una... paradoja no... **¡¡Claro!!** que incluso a niveles altos también, están viendo cómo resolverla porque ¡¡Detiene el proceso de las obras, detiene la buena ejecución de los proyectos importante, no resuelve los problemas ¡¡de raíz!!... de raíz y nos vamos a procesos como éste demasiado caros ...”

LJCHG “¡¡Pero digo en un mundo ideal, porque mientras tengas a las contralorías como las tienes!! que no son gente muy capacitada, que no son abogados que realmente entiendan la operación... que a ellos los cambian mucho más que a nosotros y que entonces tienen como una obsesión, en lugar de sumar para ver como sacamos la operación me entiendes, si no para ver en que te agarro ¡¡Y a los que en verdad cometen corrupción nunca les hacen nada!!”

**CRGV. ¿Y porque no se pudo mediar?**

JCYPS ¡¡Por eso!! ¿Quién firma? ¡¡Yo firmo.....!!

MYMP. Al día siguiente viene la....Función Pública.

#### **5.16.1.2.5. Politicization of the Arbitrations.**

As it is well known, the power in Mexico was for more than 70 years in the hands of one political party, the PRI (Partido Revolucionario Institucional - Institutional Revolutionary Party). However, since 1 December 2000, the mandate of such a party ended. Thereafter, the PAN (Partido Acción Nacional - National Action Party), which has been in the power since then, and the PRD (Partido de la Revolución Democrática - Party of the Democratic Revolution), have represented two real political choices in the new Mexican democracy. In other words, a more real struggle for the power has been felt and not a fictitious one, as we had felt for decades. So, PEMEX has been, in a large extent, a flag to be waved by the party in power or a target to be attacked by other political parties.

As mentioned earlier, PEMEX is a government entity and not a private enterprise, and the job positions are political stairs which politicians try to climb to get a better position in politics in Mexico. Unfortunately, this has represented that the job positions are in any way rotary<sup>840</sup> and sometimes occupied by people whose main interest is to find a better political position without any intention to benefit PEMEX.

As for the arbitration proceedings are concerned, every time an award is rendered by an arbitral tribunal, it is an important moment for the officials involved, if PEMEX won, and top officials of PEMEX stand up their “neck” showing off the entity success. If the case is that PEMEX was convicted, it is also a cause to attack and blame the officials involved, whether or not they had the blame on the condemn.

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<sup>840</sup> See infra pp. 297.



In particular, our impression is that the CONPROCA arbitration has lasted so long and has had many obstacles to reach an agreement through negotiation or mediation mainly due to the politicization that had been given to the procedure. Somehow, it has been like a time bomb that has been passed from hand to hand among the politicians who have occupied important positions while the procedure has lasted. In this regard, we find very interesting the opinion of some interviewees when asked about the politicization of PEMEX and its arbitrations.

*LJCHG. “Bueno, ¡¡sí, sí... PEMEX está muy politizado siempre ha estado muy politizado!! esta politización de los temas en automático te da desconfianza, porque sabes que no se está buscando arreglar por el bien institucional, si no por una presión política.”*

*LJCHG. “En el tema del arbitraje no creo que sea tanto (politizado) porque ¡¡normalmente tus contrarios son empresas extranjeras!! y en el tema de la mediación sí, porque al ser político muchas veces se busca favorecer a ese que te pide el favor... no a la institución, y es cuando viene la desconfianza por parte de los funcionarios públicos, no... porque sabes que a lo mejor el funcionario que te lo está pidiendo que normalmente es de nivel jerárquico superior, lo está haciendo a lo mejor por un interés de quedar bien con los de su partido o, los que le implican un beneficio a futuro si no a lo mejor entender bien el fondo del asunto y que al final del camino, ¡¡Pues hay que rendir cuentas no!!”*

*JGGF. “En el político, bueno desde luego que ahí si ¡¡yo no soy político, no pertenezco a ningún partido político!! Sin embargo veo que últimamente pues hay litigios que se están resolviendo en los medios de comunicación inclusive, ya sean periódicos o a través de la televisión, porque bueno un partido tiene ciertos intereses y esto a lo mejor impide que se llegue a una conciliación con el otro partido político.”*

**CRGV. “Cree que el asunto de CONPROCA de alguna manera se politizó?”**

*JGGF. “¡¡He.... si!! o se ha utilizado por algún partido no, no, no..... yo creo que fue más bien una cuestión política y conste que hablo de lo que los periódicos han publicado.”*

**CRGV. “¿Y cuales son de carácter social (elementos), si existe también alguno?”**

*CEDM. “El nacionalismo del Artículo 27 Constitucional, lo que es un medio de someter las decisiones de PEMEX a tribunales que no son los nacionales, a la jurisdicción nacional ¡¡que interesante eso, nacionalismo!! Y eso fue lo que motivo todas las discusiones de la reforma petrolera con relación al arbitraje. De hecho está prohibido en materia de obras públicas, en materia de obras públicas someter a derecho extranjero las controversias no...”*

#### **5.16.1.2.6. Subordinate Positions.**

Closely related to the previous point, we have this obstacle called subordinate positions. We refer to the fact that the organizational structure of PEMEX is organized in a pyramid way, so that, there are in the top those officials with powers of control and sliding them a

structure with officials that will obey the instructions of their superiors. The job positions are even listed with numbers that represent the level, features and salaries that each employee has. In this regard a PEMEX official told us:

**CRGV. Que es eso perdón del nivel 35,36 ó 37?**

JGGF. “Los trabajadores de PEMEX tenemos asignados un cierto nivel y de acuerdo a ese nivel ocupamos una categoría y ocupamos.... ¿de ahí las facultades que tienen? Exactamente y obtenemos de ahí nuestro salario y por ejemplo nivel 36 tiene ciertas atribuciones un nivel 37 tiene éstas actividades, y así sucesivamente de modo tal, mientras más alto sea el nivel pues tiene mayor responsabilidad y obviamente tendrá una mayor capacidad de decisión en un determinado problema.”

In this subordination relationships, inferior officials must obey their superiors and, in many cases follow their instructions, as we saw above, they might have a political purpose rather than benefits to PEMEX. On the subject of arbitrations, it has happened the same, and the people involved had to follow the trend that their superiors had, which might change the course of the decision as well. Interesting what two PEMEX officials commented about it:

LJCHG. “bueno me tocó en alguna ocasión un auditor que vino hace algunos años en el jurídico de PEMEX Gas y él, él quería fincarnos una responsabilidad porque los juicios laborales no se movían en mucho tiempo, ... todo el tema tiene que ser lo suficientemente transparente para cuidar al funcionario que está llevando a cabo la negociación, porque además muchas veces es la instrucción de el de arriba, y el que firma es el de abajo no, entonces...”

**CRGV. “y el de la responsabilidad es el de abajo”.**

LJCHG. “Claro y el de abajo a lo mejor puede estarte diciendo, no!! Yo creo que, el riesgo no es el que se está plantando, o sea yo llevo el asunto, yo lo conozco y, yo creo, por decirte, sí negociamos, por poner un ejemplo eh, el contrario dice que el asunto vale 500, pero yo estoy cierto que, que no deberíamos de pagar más de 100, eso sería lo correcto finalmente si el abogado titular es el que va a firmar, lo correcto es que trataras de negociar sobre los 100 pero además estoy obteniéndole un costo-beneficio a la institución sí a lo mejor, por decirte te dijera tú contrato, bueno, dame 150, ni tu ni yo, mira te doy 100 por que te lo estoy dando en este momento, no te vas a esperar a un litigio que va a durar 4 años, pero además ese funcionario, si de alguna manera se la está jugando, porque el día de mañana puede venir un auditor y puede decir y porqué no fueron 90, claro entonces tu en qué te basas, en que estuvo tu decisión, si éste abogado no puede justificar que 100 era un número brutalmente razonable, que porque, ibas a pagar gastos y costos, eran tantos años más de juicio, o sea pues si está en problemas, claro entonces hablando de transparencia hablo de tener los elementos suficientemente, si tú quieres no contundentes, pero razonables, para demostrar que en ese momento, era algo bueno, es tú mejor escenario.”

JGGF. “En el aspecto ya alejado de los partidos políticos desde luego que hay decisiones que implican pues un cierto riesgo y ese cierto riesgo muchas veces no lo podemos asumir, sin alejarnos del aspecto político, ya sea a nivel interno de Petróleos

*Mexicanos porque viene de una instrucción superior, porque esa instrucción superior pues hay que cumplirla porque si no la cumple uno entonces trae consecuencias.”*

#### **5.16.1.2.7. Job Rotation (Group Heads and Managers).**

Another obstacle that we could detect was the staff turnover in PEMEX. Since there have been many changes of the Attorney General, and staff that has been in charge of the arbitration proceedings. The above means that the technicians and lawyers who take on a case have to catch up and when we talk about procedures with boxes and boxes of material, it is very difficult to catch up. On the other hand, the tendency of each head of sector, especially in bodies like PEMEX, where political factors influence, is very different from each other. Thus the work of an attorney general who has an ideology “pro ADR” will be truncated if the successor does not have the same mindset. In this respect some respondents told us the following, what is interesting when recognizing the harm that staff turnover might cause, and the decisions taken by people who have not been involved in the case:

##### **CRGV. “Cuantos abogados generales han pasado en 10 años?”**

*LJCHG. “¡¡Siete, vamos con el séptimo!! Porque dos veces se fue el titular y quedo un encargado ¡¡No, tres veces, tres veces!! De esos siete tres veces fue encargado o sea primero... es Cesar Nava se fue, queda el encargado... nombran a Juan Carlos Soriano se va queda el encargado y fue el mismo eh, el Lic. Iturbide, el entrega a Néstor, Néstor se queda ya un buen rato, luego se va Néstor se queda Iván Alemán de encargado se va Iván y llega ahorita Marco Antonio de la Peña...”*

##### **CRGV. “¿Y cual ha sido la postura que han tenido estos abogados internos con este arbitraje, ha sido muy variada?”**

*LJCHG. “¡¡Muy variada!! Siento que ninguno lo ha llegado a conocer más que el que esta ahorita. ¡¡El que esta ahorita es el primero que se sentó, bueno una cosa increíble hubiera parecido que hasta ya lo conocía!! ... pero yo te podría decir que ninguno como él le ha entendido, ninguno como él se ha preocupado por entenderle y digo el entendió...”*

*Había un área de proyectos en PEMEX Refinación ¡¡llega la administración de Fox y deciden pues desaparecer esa área y crear una área de proyectos en el corporativo!! y ese grupo... esa dirección, esos directivos son los que dan los 900 y tantos millones y yo te soy sincera y te aseguro que sin el conocimiento suficiente del asunto **¡¡Claro!!** fue la gente que preparó la contestación de la demanda... la reconvencción ¡¡pues yo ahí sí creo que fue un error tremendo, catastrófico!! porque ellos venían llegando, era una administración que venía llegando, ellos ¡¡la mayoría o ninguno de los directivos era gente de PEMEX!! y la gente de PEMEX no creas que le hicieron mucho caso, más bien ellos los hicieron a un lado totalmente, entonces es donde tal vez a la vuelta del camino te explicas pues como salieron los 900, porque tenían mucha desconfianza...*

*Entonces... siento... te digo que en la parte de proyectos ¡¡Si fue gravísimo el cambio, gravísimo... gravísimo!! Porque pues y luego a los que ponían a defender de lado técnico pues no eran los ingenieros del proyecto, eran los nuevos que habían llegado*

*en el gobierno, entonces bueno... de ahí pues te explicas muchísimas cosas... y esa misma gente fue la que siempre quiso negociar el asunto, que bueno ¡¡Porque los ángeles nos cuidaron, no se dio, porque al final del camino!! terminamos sí con un ingeniero que no era de PEMEX ¡¡O sea que no era de PEMEX me refiero de trayectoria amplia en PEMEX!! que no vivió el proyecto para nada pero que al final nos compro... nos compro nuestra verdad y la ha defendido e hizo equipo con la gente del proyecto, los residentes y todo, entonces.”*

*MYMO. “O sea siento que no hubo al principio esa cohesión entre lo que es la parte jurídica de aquí y la parte técnica ¡¡claro!! sí... y en la parte técnica... ¡¡el problema aquí es que te cambian funcionarios como... de ropa todos los días ¡¡Dilo... dilo... dilo... como calzones¡¡ como calzones!! y entonces no puedes tener... no tiene una línea, una directriz fija como en una empresa privada.”*

**CRGV. “¿Y había mucha rotación de personal?”**

*VMLL. “¡¡Sí hubo, hubo mucha rotación de personal!!”*

**CRGV. “Ok y ¿cree que eso afectó un poco al mal manejo de?”**

*VMLL. “¡¡Yo creo que sí, yo creo que sí le afecta a PEMEX porque la curva de aprendizaje, el aprender los reclamos, entender lo que está pidiendo la otra parte, el obtener las pruebas pertinentes, etcétera, pues es una curva de aprendizaje larga no...”*

#### **5.16.1.2.8. Lack of Training.**

Derived from the observation process inside PEMEX, as well as an outcome of the opinion of some respondents, it is concluded that a major obstacle is the lack of trained staff on ADR issues in PEMEX.

This is corroborated by the opinion of an expert on the subject by mentioning that one of the reasons why ADR are not truly applied was:

*GRYR. “la falta de capacitación de su personal jurídico interno para especializarse en la utilización de estos medios alternos, lo que los inclina a tomar como decisión de manera regular la utilización preponderante de la vía judicial”.*

We believe that training of legal personnel, administrative and technical staff of PEMEX and all its agencies is adequate to fulfil the Oil & Gas functions it was granted. In the case of legal staff, with no doubt, PEMEX has got a well trained and skilled group of lawyers who are capable enough to handle any type of conflict, whether labour, civil, commercial or international in nature; however, we believe that such skilled are more focused on court channels rather than ADR methods.

With regard to alternative means of dispute resolution, specifically mediation and arbitration, there is neither the training nor adequate preparation for internally handle these

procedures. Therefore, they necessarily turn to outsourcing when a conflict comes that will be resolved through mediation or arbitration.

It is true that as a result of one of the arbitrations in which PEMEX has participated, the most important in terms of time and amount, a training course was given to a group of lawyers and technicians who participated in it. However, as recognized by one of our interviewees, a measure was not taken in time:

*MYMP. “Yo, quiero suponer que (EL CURSO) fue a raíz de todos los arbitrajes que se han tenido, ¡¡desafortunadamente no nos lo dieron al principio!! ¡¡Ok!! que hubiera sido de mucho beneficio ¡¡sí les hubiera servido!! porque para nosotros ya era más bien el ir reafirmando y contestándonos algunas preguntas que ya habíamos vivido en el arbitraje!!*

After this training course there has been no evidence of training, either through courses, written information, etc. We believe it is needed a “preventive” training, because most of the PEMEX construction contracts, provide as the dispute resolution clause, the arbitration clause, which means that in the future, near or not, there will be many disputes to be resolved and the situation will require not only fully trained staff on arbitration but also on mediation and other ADR.

**CRGV. “¿Y que opinión tiene respecto de la capacitación que tiene PEMEX en esta materia?”**

*VMLL. “Bueno, yo creo que lo que yo conocí fueron abogados que hicieron un gran esfuerzo, digamos por defender la posición de PEMEX pero definitivamente requieren de una muy buena capacitación adicional, requieren aprender a hacer interrogatorios, contrainterrogatorios, requieren aprender a hacer presentaciones para los árbitros, requieren de incrementar sus habilidades como abogados, o sea son abogados que digamos, actúan de manera correcta pero que si necesitan y no solamente lo digo por los de PEMEX ¡¡en general!! En general yo diría los abogados mexicanos requerimos de una capacitación adicional para digamos, exponer, interrogar, en general para presentar los casos.”*

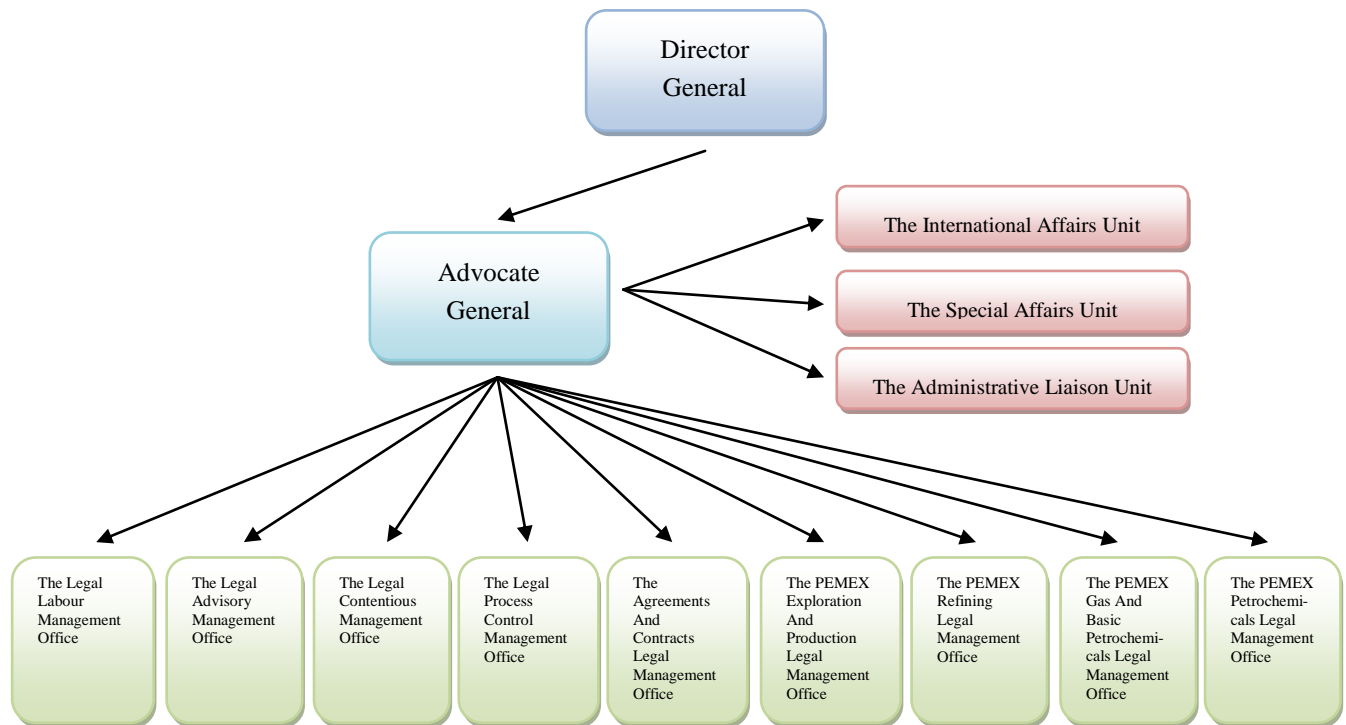
#### **5.16.1.2.9. Lack of an Internal Specialized Area.**

To discuss this point, it is first necessary to know the organically legal apparatus of PEMEX. This apparatus is as follows. The head of the legal group in PEMEX is the Advocate General, who reports directly to the Director General. The Advocate General's office has nine management offices: (i) the Legal Labour Management Office, which as its name suggests deals specifically with issues related to employment, (ii) the Legal Contentious Management Office, which serves those legal matters that are not labour such as civil, criminal, fiscal, administrative, etc., (iii) the Agreements and Contracts Legal Management Office, which is responsible for those agreements and contracts to be made by the entity; (iv) the Legal Advisory Management Office, which is responsible for answering precisely the queries that are made to the entity, (v) the Legal Process Control Management Office, which conducts legal statistical issues attending the Advocate General's Office, whether contentious or non contentious, (vi) the PEMEX Exploration and Production Legal

Management Office, (vii) the PEMEX Refining Legal Management Office, (viii) the PEMEX Gas and Basic Petrochemicals Legal Management Office, and; (ix) The PEMEX Petrochemicals Legal Management Office. These last 4 legal management offices provide services to the subsidiary entities but they do not depend directly on them. They depend directly under the Advocate General and therefore they are part of the corporate structure.

Additionally, the Advocate General's office has 3 units: (i) The International Affairs Unit, (ii) Special Affairs Unit, (iii) The Administrative Liaison Unit.

### Legal Group in PEMEX



The staff of the Advocate General's office consists of a total of 722 people, of which approximately 410 are lawyers and the rest belongs to the administrative staff. There are some people who do not have a law degree, they have other professions that are also within the structural framework of the Advocate General's office, such as accountants, administrators, etc.<sup>841</sup>

As it is clear from the information previously provided, there is not currently an area in PEMEX that is specialized in arbitration or mediation. The administration of an arbitration proceeding is normally channelled to the subsidiary involved in the procedure, and the legal

<sup>841</sup> Of these 410 people, we must make the distinction that not everyone is directly responsible for trial procedures. Within those to whom cases are directly assigned, are the trial lawyers, whose bosses are coordinators. These coordinators depend from assistant managers who report directly to the manager.



staff involved is usually different in each case. This situation represents an important difficulty, since the legal staff dealing with an arbitration is prevented from taking advantage of the arbitration experience got in another subsidiary. Inclusive, derived from the observation process completed inside PEMEX, we realized that they do not have the physical or electronic file organization that a specialized area of this nature should lead. Below there is the answer to a question addressed to two very high-level respondents in the internal legal structure of PEMEX, who were asked if there was an area inside PEMEX in charge only to arbitration:

*LJCHG. “¡No... no la hay!!”*

*JGGF. “¡No, no, no, no lamentablemente no tenemos un área específica para la atención de los arbitrajes!., esto se debe principalmente a la gran cantidad de juicios que atienden los mismos abogados litigantes, es sabido pues que los arbitrajes por naturaleza son problemas muy fuertes, son expedientes muy amplios, los montos son impresionantemente altos, que requieren de una atención específica, no nada más por un abogado si no por un grupo de abogados ¡claro, un equipo!! exactamente, que lamentablemente, no tenemos disponibles y que quizá esa sea la razón principal por la cual se acude a la contratación de un despacho externo con la capacidad tanto de experiencia como de personal para la atención de un asunto tan importante como lo son los arbitrajes.”*

So, what happens when an arbitration case falls into PEMEX? The allocation of cases is done considering its origin. If the arbitration results from a subsidiary body, the legal manager of that subsidiary is in charge. He selects the lawyer or lawyers who would be responsible to monitor and administer this arbitration. Generally, the most renowned PEMEX arbitrations have been taken by PEMEX Refining and PEMEX Exploration and Production. As an exception to this rule, due to the complexity of the matter and an internal change of the legal manager at PEMEX Refining, an arbitration procedure was moved, the most important for PEMEX, to the Special Affairs Unit. In the case of the other arbitrations, they were assigned to the Legal Management Offices of PEMEX Exploration and Production and PEMEX Gas and Basic Petrochemicals.

There is a PEMEX in-house lawyer who long ago was given the position of coordinator for arbitrations of PEMEX Exploration and Production. However, this position was given at a time when there were many arbitrations in process. Nowadays, he is currently in charge of administrative litigation procedures and has no task for any preventive program on ADR issues.<sup>842</sup> The conclusion we draw is that, when an arbitration comes to PEMEX, then a team of technicians and lawyers who will support that process is formed, that is, an ad-hoc team. There should be a full time team in charge of: (i) assisting arbitration procedures and (ii) developing preventive activities. Amongst these activities we can mention: training courses to technical and legal staff of the company, to study the arbitration cases in which

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<sup>842</sup> As a result of the field research in PEMEX, we can say that this is the most experienced lawyer who takes ADR issues and has participated in 5 procedures. We believe one of 410 lawyers who are part of the legal department is nothing!! In other words, our point is that only one expert out of 410 is not enough and we might state that all the others are not ADR expert at all.

PEMEX has been a party, to study the subject matters of the conflicts, to conduct studies on arbitrators, lawyers, arbitral institutions, and so on.

#### 5.16.1.2.10. Cultural Differences in Arbitrations.

As mentioned in Chapter III of this paper, several aspects of ADR procedures help us to assess the ADR legal culture, as well as to compare two different legal systems in this regard. In the case of PEMEX arbitrations, we mention that they have been influenced by characteristic elements of our legal system, and the Common Law system. This opinion was supported by many of the interviewees. One of them commented:

**CRGV. “Ok ¿Qué tendencia han seguido los arbitrajes en PEMEX en los que usted ha participado, del “Common Law” o derecho civil?”**

*VMLL. “¡¡Derecho civil!! Aquí digamos, por eso te lo voy a decir, digamos el abogado mexicano que trabaja junto con el abogado americano justamente hace el trabajo de investigación y de argumentación con base digamos en el derecho positivo mexicano, sin embargo, también es cierto hay que reconocer que los abogados americanos tienen una preparación diría yo muy enfocada a la argumentación jurídica, o sea tiene básicamente una habilidad especial para la argumentación del caso y como llevan de la mano digamos al lector para que vaya entendiendo el caso y concluyendo.”*

**CRGV. “De hecho creo que ya contestamos la siguiente pregunta dice ¿Qué tendencias han seguido los arbitrajes en PEMEX en los que usted ha participado del common law o derecho civil?”**

*SFG. Pues en la medida que te toque una contraparte, PEMEX puede continuar y es un estilo correcto de hacer las cosas es decir no quiere decir que un estilo sea mejor que el otro, hay que hacerlo de manera estratégica, a fin de cuentas lo que se busca es convencer al tribunal arbitral y hay muchas maneras de hacerlo, si el tribunal está formado del presidente por ejemplo si es un abogado de formación de Common Law vas a tratar de transmitirle la información de tu caso en las audiencias, de una forma que le sea amigable, que le entienda, que esté familiarizado con ella.*

*Eso por ejemplo en el caso maestro es una de los casos de lo que podemos hacer, nos podemos cambiar la careta para ser mas del Common Law lo o menos del Common Law como sea conveniente atendiendo a lo que tienes enfrente el objetivo a fin de cuentas es convencer al tribunal arbitral, si te conviene hacerlo con una estrategia siguiendo estilo de Common Law donde por ejemplo el tema de los interrogatorios de los contrainterrogatorios hacerlos estilo Common Law pues los haces al estilo Common Law, quizás eso tenga que ver un poquito de cómo llevas adelante las solicitudes de intercambio de información del discovery.*

PEMEX arbitrations have been characterized by the presentation of long documents, which have been abundant in content, though not necessarily in substance. Then, the volume of files that are accumulated are very high and this makes prolonged procedure not necessarily recommended. Thus, an interviewee showed the differences between the way presenting the case and the interpretations the arbitrators could have before those behaviours.

*CEDM. “Ah, las diferencias culturales también, en cuanto que nosotros también estamos más acostumbrados a probar con documentos y quizá otras partes acostumbradas a probar con testigos, tribunales mixtos de diferentes orientaciones jurídicas también, pero muy arbitralistas también, están más orientados a los testigos, están más orientados a ver las conductas de las partes que a lo mejor lo que está establecido textualmente en el contrato, interpretar la variaciones contractuales de las modificaciones contractuales también de distinta manera como nosotros no.... y sobre todo vuelvo otra vez que somos un organismo público y que la confirmación de nuestra voluntad por ejemplo para modificar un contrato, o modificar un pacto contractual tiene varias etapas dependiendo del nivel de competencia o atribuciones legales que tenga cada funcionario pero por ejemplo ellos nos lo aplican, la teoría de factores dependientes a cada nivel de funcionario, no es posible pues.... porque un funcionario que te puede decir que sí, te lo hace en cierto nivel de atribución y competencia que no significa que se vaya a modificar el contrato que ya se modificó, pero como es empleado tuyo, es tu factor o tu dependiente te obliga no... no precisamente pues entonces si hay ciertas diferencias y sigo hablando de derecho administrativo y ciertas diferencias culturales no... ah y lo que te seguía hablando, por cierta discriminación sobre PEMEX sobre **¡¡sí se nota!!** Sí, sí se nota.”*

Another issue that came out from the interviews was the situation of hearings, which are proper of the Common Law system. They have had good acceptance in arbitration proceedings in which PEMEX has been a party. We must conclude, however, that Mexican lawyers may have some kind of disadvantage before their American colleagues. No matter in how many arbitrations they have already participated in, they must not be enough to be competitive with American lawyers at hearings. I mention the comments of a lawyer (interview not recorded) that commented on the great handling of American lawyers in hearings against the notorious inexperience of Mexican lawyers.

Also, the use of “discovery” that, while not being a part of the Mexican legal system, it has become fashionable in arbitrations, and Mexican lawyers have been increasingly involved in this step process. Unfortunately, we are unable to say at the moment that it is a part of our legal culture.

**CRGV. “¿Y se utilizo en este arbitraje, funciona el discovery cuando una de las partes no esta digamos acostumbrada a eso, hay ahí un desbalance?”**

*SFG. Pues en este caso el discovery no fue, es decir lo que se pudo obtener en este caso y de hecho todavía no se sabe es que el tribunal arbitral se convenciera de que una parte no está cooperando, eso lo haces porque algunas veces esperas realmente que te den el documento y otras veces porque sabes que no te lo van a dar **¡y para que se dé cuenta el tribunal arbitral!!** y para que se dé cuenta el tribunal arbitral pese a que lo tiene no lo quieren dar, en gran medida esa fue la estrategia aquí.*

*Entonces si a veces cuando tienes que autorizar especialmente en esa etapa del arbitraje no hay una cultura latina de discovery pero en mi experiencia resulta que ahora los abogados latinoamericanos les encanta eso ¡¡si verdad como que se puso de moda!! Y lo usan más.”*

Unfortunately, the interviews showed that in both, the negotiations in which PEMEX has taken part of as well as in the procedures after the emergence of the conflict, either in a stage prior to or during the arbitration procedure itself, there have been cultural differences that allow to mention a sense of superiority by some foreign contractors in front of a public institution in a developing country. Equally, cultural differences were noticed regarding the nationality of the parties and the involvement of public servants in the conflicts and their solution.

**CRGV. “¿Y no hubo algún tipo de diferencias culturales entre los participantes del arbitraje?”**

CEDM. “¡¡Sí, sí hubo diferencias culturales que se manifestaron en los arbitrajes!!”  
**¿Como cuales?** Por ejemplo en los de Health Banner Brutt, éste veía los cambios que nos imponían como una cuestión de superioridad técnica, digo.... Tú me pediste esto en el contrato.... Pero yo te voy hacer esto porque como yo sé más que ustedes, yo te voy hacer esto como yo quiera o como yo te proponga, si me lo aceptas muy bien **¡¡eso me interesa mucho a mí!!** Y luego me vas a pagar lo que me dijiste en el contrato y nosotros decimos.... ¿Pero por qué?.... está bien tu eres mi contratista, me dices que técnicamente esto es mejor o no es necesario lo que yo te pedí, pero por qué te tengo que pagar lo mismo.... **¡¡claro!!** O si veo también cuestiones en ese arbitraje, mismo en el que quizá los ingenieros o testigos europeos pudieran tener algún tipo de peso, mejor que testigos mexicanos ingenieros mexicanos **¡¡ah sí, ante los árbitros!!** En este en particular,¡¡ y en general un tema cultural empresa del tercer mundo siempre tiene un desvariante!! **¡¡Siempre!!** Y no necesariamente porque en realidad más bien ese tipo de empresas como Health Banner Brutt preparan sus arbitrajes desde que empiezan el contrato, van documentando, van aprovechando errores, van creando semillas para hacer reclamaciones y establecer dos o tres veces más ingresos de los que se habían pactado en el contrato. **¡¡Que interesante!!**”

**CRGV. “¿Hubo algún tipo de diferencias culturales entre las partes en el conflicto?”**

CRS. “Sí, sí definitivamente porque la empresa que fue la que demandó el arbitraje, es una empresa que tenía accionistas norteamericanos, y había, pues enfrente tenía a una empresa mexicana con capital español y un organismo público descentralizado, una empresa pública como PEMEX, con otra cultura de hacer negocios y aunado a que dentro del procedimiento se involucró gente que estaba dentro de la administración pública pues hubo cuestiones en donde se pretendió hacer presión a base de funcionarios públicos, entonces eso fue lo que hicieron que el conflicto se ahondara más..”

**CRGV. ¿Pero esas trabas, entonces si influyo un poco la nacionalidad no... de la otra parte?**

CRS. Sí influyo eh, definitivamente y la involucración de funcionarios públicos. Sí, porque había mucha soberbia de parte del accionista norteamericano y sobre todo tenía una gran relación con funcionarios públicos, entonces pensaban que por ellos podían presionar no... **¡¡ok!!** Y entonces cuando vieron **¡¡que no era por ahí!!** que nos ajustamos a derecho dijeron, no pues que sea como sea, por eso se alargó tanto ese procedimiento.”

Another interviewee mentioned interesting aspects as for the way American law firms act before international arbitrations in Mexico, as well as the way the foreign contractors visualize the proceedings in Mexico:

*VMLL. ¡¡Así es!!, básicamente así es como funciona, vamos a decir, las empresas extranjeras lo que usualmente hacen tienen mucha confianza en fundamentalmente despachos americanos ¡¡ok!! y luego estos despachos americanos a través de sus contratos, conexiones, conocimientos, pues llegan a México y subcontratan o contratan a los abogados mexicanos, para que sean los que les sirven de apoyo en toda la parte relacionada con el derecho mexicano, con el derecho sustantivo.*

**CRGV. En el caso de procedimientos internacionales ¿considera que existieron algunas diferencias culturales entre las partes en el conflicto? En caso afirmativo, favor de explicarlas.**

*VMLL. “Desde luego, en uno todavía más particularmente, en el caso de la refinería el contratista es un consorcio integrado por una compañía alemana y una compañía coreana y sí, había digamos, varias y enormes diferencias culturales y frente desde luego a PEMEX y frente a la cultura del arbitraje, o sea la manera como, digamos por lo menos en el caso, me voy a referir más al caso de la parte alemana, porque es a la que yo más, es a la que estrictamente estaría yo representando en este arbitraje y tiene una visión totalmente diferente a la parte mexicana del arbitraje y sobre todo a los abogados que participan dentro del arbitraje, entonces sí.”*

**CRGV. “¿Y cuál sería esa diferencia principalmente?”**

*VMLL. “¡¡Pues mira digamos, yo lo que creo!! digamos la manera en la que visualizan el procedimiento, la parte mexicana está poco acostumbrada a éste tipo de procedimientos en el sentido y me refiero internamente a la gente de PEMEX, el sentido que son procedimientos primero orales en los que ellos están más acostumbrados a procedimientos escritos, donde llegan a una ventanilla a entregar escritos pero no hay audiencia, no hay interrogatorios, no hay contrainterrogatorios, es totalmente diferente, es decir el arbitraje culturalmente para el mexicano creo que se ha tenido que ir... ¡¡cómo te diría!! sobreponiendo y haciendo mejores, digamos trabajos de los abogados mexicanos en los arbitrajes.”*

Next, some leading parts of some interviews are transcribed. We consider them very interesting since they denote cultural differences, not only in the PEMEX arbitration but also in the negotiation of the agreement from which the disputes arose.

**CRGV. “Claro, en el caso de procedimientos internacionales ¿considera que existieron algunas diferencias culturales entre las partes en el conflicto?, en caso afirmativo favor de explicarlas**

*SFG. “... definitivamente lo existieron ... era notorio las diferencias.”*

**CRGV. “¿Cómo cuales, qué diferencias?”**



SFG. *“Pues por ejemplo la gente, el contratista principal es te digo un consorcio formado por varias empresas una coreana y otra alemana, contratan a empresas mexicanas para adelantar la mayor parte de la obra, digamos ya civil por ejemplo contratan algo de ingeniería, entonces se vuelve después ya en el arbitraje te das cuenta de que hubo muchos problemas en la consecución de los trabajos porque sencillamente había incompatibilidades culturales.*

*Coreanos y alemanes yo me parece que no son digo no quiero sonar que estoy diciendo por nacionalidad o lo que tenga que ver sencillamente su forma de trabajar y su forma de ser creo que no son muy compatibles y eso se transmitió digamos inclusive al o impacto de la manera en la que llevaron adelante la obra si, sin duda.”*

**CRGV. “¿Y en la solución del conflicto también hubo esas diferencias culturales? O sea me imagino no se... un acercamiento para una negociación a lo mejor una parte si estaba mas, tenía mas cultura de decir vamos a negociar a lo mejor la otra parte no tenía tanto esa cultura de negociar.”**

SFG. *“Mira, no puedo realmente opinar respecto de cómo llevaron ellos sus negociaciones, mi perspectiva desde afuera es que ambas partes por ejemplo, aprovechaban la manera de operar de PEMEX para tratar de sacar el mayor provecho en sus aproximaciones de negocios con PEMEX, aproximaciones de mediar o negociar un conflicto, por ejemplo ellos operando como una empresa privada pues tiene una estructura muy piramidal, muy unificada en el sentido de que la estrategia es una y dirigida de una manera cuasi militar si quieres por una persona hasta arriba de la cadena y después abajo los capitanes y después pues el batallón, pero todos operando en una estructura muy lineal.*

*En cambio PEMEX quizá no opera así, la forma de tomar decisiones en PEMEX implica que muchos centros de control en la empresa, muchas personas que puedan tener influencia en las decisiones entonces es una manera totalmente distinta de operar ,por un lado tienes una persona que está siendo una punta de la lanza y quizá intenta hacer muchos acercamientos a diversos niveles en PEMEX, con diversas personas en un intento de lograr sacar mayor provecho que si se enfrentan con una estructura bien unificada que hace un solo frente, entonces tienes un frente que está bien unificado en un área y otro que no está bien unificado porque su proceso de toma de decisiones es distinto, nada mas desde el punto institucional.*

*Otra cosa que fue notoria me parece entre los frentes es los del lado del contratista sabían las debilidades institucionales y la manera de operar de PEMEX y un poquito sabiéndolo tratan de tomar ventaja de ello.”*

**CRGV. “Ok, y ¿un poco en cuanto esa ideal del abogado de la contraparte de un país en vías de desarrollo y de un país subdesarrollado se notó algo de eso o no tanto?**

SFG. *“Pues ¡¡se que éste es un despacho internacional pero!! En el tema del arbitraje, yo puedo decir que no de hecho curiosamente los que por ejemplo, tuvimos la iniciativa de llevar éste arbitraje a hacerlo, digamos... papel, evitar el papel porque al principio del procedimiento por las reglas que pusieron los árbitros y como la contraparte inicio el arbitraje pues era de papel y termino siendo un arbitraje*



*¡mas oral!! no, deja de oral, digital todo se intercambiaba electrónicamente y los que estuvimos insistiendo en estos cambios fuimos nosotros, entonces en el litigio no creo que haya habido una diferencia, donde pudo haber habido una diferencia es en el propio proyecto, que quizás pues no estaba tan preparado para llevar un proyecto tan ambicioso y le faltaba haberlo cocinado un poquito más antes de sacarlo a licitar.”*

**CRGV. ¿Y en cuanto al procedimiento ahorita que esta mencionado la cantidad de papeles que se utilizaban al principio estaba más cargado el sistema del Common Law, al sistema civil que tenemos nosotros, esas características de cada uno de estos sistemas, cual influía más en éste procedimiento arbitral.**

*SFG. “Yo creo que a final de cuentas fue más enfocado a derecho civil, sin embargo la contraparte, sus abogados algunos de ellos inclusive solicitaron que la audiencia fuera, que se permitiera pues obviamente exponer sus argumentos en ingles, podemos decir que la audiencia fue una audiencia bilingüe en el sentido de que hubo interpretaciones simultaneas del inglés al español y del español al inglés.*

*En cuanto al estilo hubo un estilo de hacer cross examination, ambas partes lo hicieron pero sin embargo quizás la contraparte estuvo más inclinada de hacer uso del estilo de cross examination del common law o de abogado del common law que no quiere decir que sea más efectivo, para nada yo creo que suena contraproducente cuando tienes un tribunal de tres árbitros siendo formados en derecho civil no es quizás la mejor de las ideas, intentar llevar tu estilo de litigar o llevar adelante una audiencia de ese tipo del common law que son no tanto con el fondo del derecho.*

*El que se aplica aquí es el derecho civil, derecho mexicano, ambas partes hicieron uso pues para presentar mejor sus argumentos de doctrina internacional y de casos de construcción de todo el mundo pero sin embargo al final de cuentas la base es derecho civil ¡¡claro!! y derecho mexicano en particular. Pero en cuanto a estilo de litigar si una parte litigo quizá con un estilo más anglosajón que otro.”*

#### **5.16.1.2.11. Misleading Decisions thru the Proceedings.**

It is difficult to assess the decisions made within a process and classify them as “erroneous”, and much more if we were not part of the procedure. However, as part of an objective analysis and derived from the interviews, we might conclude that, in some arbitrations herein analyzed, decisions were made reflecting the legal culture of lawyers in Mexican proceedings.

It is very important that the parties must make their decisions following the applicable rules. The contractors must take into account that from the moment they decide to sue PEMEX, they are deciding to fight the company which has given them work. This does not mean that they must not claim their rights, but we believe it is transcendent the way they determine to do so. In this case, negotiation or mediation may be even better than arbitration or a trial before a state court.

So, decisions to be made by the parties must be carefully thought since the experience has shown that they have not done that. As an example, we believe that a common practice in

national courts and in ADR procedures in this country, is trying to mislead the judge or arbitrator instead of helping him/her to find the truth that will resolve the conflict. In this regard, we can mention the following:

JCYPS. “Pero la demanda en si completa con toda la argumentación de los reclamos ¡¡Y el soporte!! ¡¡Era... es... no sé cuántas carpetas, es mucho!! es mucho y con la mentalidad de mala fe, de que entre más papel le dé yo al árbitro, mas se hace ¡¡bolas!! bolas... se pierde... y me va a dar la razón ¡¡claro!! de las dos partes.”

**CRGV. ¿Creen que llego a algún momento en que era la intención de las dos partes?**

JCYPS. “¡¡Sí de eso estoy seguro¡¡ ¡¡Saturar a los árbitros!! yo estuve, - como preámbulo... como antecedente - yo estuve en una empresa... fui titular de una empresa privada haciendo reclamos mucho tiempo no quiere decir que usáramos eso como técnica, pero es una de esas técnicas que se usan cuando no tienes la verdad y lo confundo para que no se dé cuenta que no tengo la razón... ¡¡Claro!!”

**CRGV. ¿Y eso fue un poco lo que paso aquí?**

JCYPS. “¡¡Un mucho!! ¡¡Los únicos buenos fueron los árbitros, las partes no fueron buenas!!

JCYPS. “Entonces lo que haría yo... y lo hice... cuando yo llegue aquí en el 2005 y empezamos a una siguiente etapa... Me acuerdo que en una reunión en que estaban los abogados, estaba yo... con los abogados de aquí y estábamos todos los de mi grupo, lo que acordamos ¡¡no volvamos a decir otra mentira, por favor no volvamos a mentir!! no nos va a llevar a nada porque estamos ante un tribunal que no se chupa el dedo que tiene mucha experiencia, que sabe lo que está haciendo... no me acuerdo en que momento dijimos eso, tal vez después del laudo parcial ¡¡ya no vamos a mentir, vamos a la etapa de cuantificación, digamos la verdad, si hay que pagar... pagamos pero no digamos mentiras!! Creo que nos resultó... creo que la segunda etapa la de cuantificación la hicimos ¡¡mejor!! Mejor... no bien si no mejor.

JCYPS. “Hubo mucha comunicación de los abogados externos con los abogados de PEMEX, con el área técnica nuestra y con los expertos técnicos que nos asesoraron ¡¡no se qué éxito tengamos, pero si tenemos algún éxito por ese cambio de cultura, para que voy a mentir y porque voy a mentir diciéndote que es de noche si ahí está la ventana y ves que es de día!! por favor... hubo mentiras... ¡¡Garrafales!! garrafales... garrafales...”

**¿De las dos partes o de PEMEX?**

JCYPS. “De las dos partes pero de PEMEX hubo muchas mentiras... muchas...”

**CRGV. Y esas mentiras propiciadas por quien... bueno no... no quiero nombres digo por ¡¡Gente!! ¿el mismo PEMEX, por asesores externos... llámese abogados, llámese asesores técnicos o de plano porque fue una reacción de supervivencia?**

JCYPS *¡¡Es muy complicado yo diría, pero no tengo las pruebas, se han salido, se han ido del proceso por corrupción!!*”

#### 5.16.1.2.12. Economic Personal Interests.

When corruption exists we must also talk about personal financial interests. PEMEX has been an entity that paradoxically has been seen as the oil fields it exploits, of course Cantarell is the best example, which over the years is running out of oil. So, PEMEX has been the target for people and companies who see it as an oil field that is gradually running out of money and consequently gaining little by little more economic problems.

Arbitrations have been a big business for some people and companies involved, including some officials that have authorized claims without examining them, possibly in exchange of some economic benefits. It is also perceived that there have been some officials who, directly or indirectly, have had economic benefits from some arbitration proceedings. We clarify that the opinion previously expressed is entirely personal and based on what was obtained in the interviews.

On the other hand, we must recognize that these arbitrations have been a good business for those lawyers who have intervened in the proceedings, both those defending PEMEX and those defending contractors as counterparties. In this particular case, there is no mention that corruption existed. Our view on this respect is simply focused on highlighting the high amount of fees that the parties have paid to legal professionals and, in some ways, the defenders’ interest on lengthening procedures instead of finding a quick solution to the problem. Next, there are some comments in this regard.

MYMP. *Yo siento que también los abogados de CONPROCA que tienen ocho, ocho despachos a lo largo del correr del tiempo también fue más bien ¡¡cómo te saco dinero en lugar de cómo te ayudo!!*

#### **CRGV. Los abogados, como cobraron, por tiempo o por...?**

MYMP *¡¡No sabemos con ellos (con la contraparte), con nosotros cobraron por año ¡¡Por año!! era un contrato anual si... y por ejemplo si veíamos que... por ejemplo hubo un año en que prácticamente lo que se hizo fue más la parte técnica, de estar trabajando toda la parte que nosotros teníamos que soportar, técnicamente con nuestro peritos, entonces se les hizo una terminación anticipada al contrato... para ese año no cobrar ¡¡Los nuestros!! de ellos no tenemos ni la más remota idea...*

JCYPS *¡¡“Pero cobraron ¡¡ pero cobraron, porque al final cada quien presentó sus gastos y cosas.”*

#### **CRGV. “¡¡Si cobraron muchísimo ¡¡ muchísimo, saben cantidades mas o menos de lo que cobraban los abogados?”**

JCYPS *“¡¡Si, si las tengo!!”*

MYMP “¡¡Si, si las tenemos porque¡¡ nosotros presentamos un escrito con todos los costos.”

JCYPS “¡¡No sé si sea conveniente decir o que las...!!”

JCYPS “¡¡pero los abogados y los ingenieros quieren ganar dinero!! y ahí viene el problema de cómo deben trabajar, si trabajan por tiempo entonces mientras más dura el proceso más ganan, serian tontos si lo terminaran, en los primeros seis meses.”

### 5.17. ADR Legal Culture in Mexico.

After a discussion of quantitative and qualitative results of our research, it is necessary to return to the initial question of whether or not there is a legal culture favourable to ADR in Mexico. We will start with the issue of ADR legal culture in Mexico and later on moving to a more specific opinion on ADR legal culture in PEMEX.

It is not easy to answer the initial question of whether there is an ADR legal culture in Mexico, and much more difficult to give an assessment to that answer. Following up the line of research that Marina Kurkchian took at her research work, we also started with a research beginning question, “is there really a legal culture in Mexico?” which would be resolved by answering practical questions about the subject, as in the case of “Does Mexico have an adequate legal framework to use ADR, specifically in the oil sector?”, “Is the application of ADR the same in the public sector than in the private sector in Mexico?”, “What is the perception of lawyers in Mexico about ADR?”, “what is the ADR education at Mexican universities?”, “What is the perception of ADR inside PEMEX?”, “What are the obstacles that have prevented PEMEX from using ADR and realizing their benefits?”, Does the legal status of PEMEX affect the company when resolving conflicts?”, amongst others.

We tried to give answer to the above mentioned questions, amongst others, by carrying out a documentary research, and a field research, having used both, quantitative and qualitative methods.

We have to make a little history to understand the level of legal culture that exists in this country. In Mexico around 1990 – 1992, the North American Free Trade Agreement (NAFTA)<sup>843</sup> was negotiated and signed. This agreement represented a legal alliance with our northern neighbours unprecedented in this country. After the signing of this document, it has been a tendency to change different laws aimed to allow arbitration procedures for resolving disputes.

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<sup>843</sup> The North American Free Trade Agreement was signed on December 17, 1992 and entered into force on January 1, 1994. The topics covered were: Objectives, General Definitions, National Treatment and Goods Access to Market, rules of origin, custom procedures, energy and basic petrochemicals, agriculture, animal and plant health measures, emergency measures, standardization measures, public Government Purchases, investment, cross-bordering trade of services, telecommunications, financial services, competition policy, monopolies and companies in the market, temporary entry of business persons, intellectual property, publication, notification and administration of laws, review and dispute resolution of antidumping and countervailing matter, institutional arrangements and procedures for dispute resolution, Exceptions and Final Provisions.

So, the NAFTA has a specific chapter to resolve commercial disputes based on arbitration procedure. We might think that it is the beginning of a change to an adoption of the use of these mechanisms, or much better the beginning of an ADR legal culture, since before such an international document the subject of ADR was almost nil in this country. The signing of this treaty triggered changes in various legal ordinances.

Therefore, we must start from the premise that Mexico has got an adequate legal framework for resolving disputes through ADR. We already exceeded 10 years of the reforms on ADR in the Code of Commerce, and recently there have been major reforms, reforms which are a product of ADR experience in Mexico. It is worth mentioning again the provisions of Chapter IV of this work, where a detailed analysis of applicable law is done.

As a result of this analysis and considering the point of views expressed by our respondents we are now able to confirm the premise on having a good law on arbitration and Oil & Gas. Here are some of the transcendent statements from our interviewees:

*GRYR. “Sí ¡¡Repito el marco jurídico mexicano es adecuado!! está abierta la puerta para utilizar en mayor medida tanto la mediación como el arbitraje.”*

*JARM. “Tenemos un Ferrari, tenemos las llaves, pero pues nos falta saberlo manejar no, buenos pilotos, nos faltan calles para poderlo circular también,”*

After clearing the idea of the Mexican legal framework, we should make the distinction between the public and the private sector. One could speak of a greater use of ADR in the second one, it means the private sector, and therefore a higher level of legal culture in this regard. As discussed by a specialist in the field of energy law in Mexico when answering the question of his point of view on the use of ADR in Mexico.

*GRYR. “... en México debemos distinguir lo que es el sector público del sector privado. Por lo que se refiere al sector público por una parte es común que todos los procedimientos se lleven regularmente por la vía judicial. En el sector privado en cambio sí ha habido alguna disposición o alguna aceptación mayor para aplicar estos medios alternos de solución de controversias. ... El arbitraje, obliga a las partes a aceptar la resolución que tome el Tribunal Arbitral y de alguna manera parece un medio de solución definitivo que en el sector privado en México se ha utilizado de manera más común o más regular que en el sector público.”*

The next issue is related to the level of ADR legal culture of the arbitrators and Mexican lawyers. There is nowadays a well known group of arbitrators in Mexico, even internationally, who are regularly involved in all the arbitration procedures usually administered by the AAA or the ICC. From our point of view, they are not necessarily trained in specific issues such as the energy sector.

It is important to recognize here the change that has occurred in this country over the past twenty years, and that lawyers are very accustomed to resolving disputes before state

courts. In other words, it is not advisable to request a trial lawyer to take care of arbitration proceedings, since he will want to deal with the same court litigation mentality and it is obviously not the same. There is a change, we do not deny it, but we believe it is not enough yet.

*JARM. “lo que falta es preparación, de abogados en arbitraje, yo creo aquí es preparar abogados como árbitros, preparar abogados, como abogados de parte y prepara inclusive abogados como peritos, ...*

In arbitration there is flexibility not only on the filing of the lawsuit but also on the filing of any document that will integrate the “litis” of the case. It is a flexibility that really makes the difference between this procedure and the court proceeding mainly when offering and presenting evidence.

In a judicial proceeding, one is subject to deadlines, and rigid procedures and methods. Lawyers when participating in this type of judicial proceedings, have to work with a view of all these specific rules. The problem has been to change the mentality of judges and lawyers. The change has been slow, but we can clearly see the benefit of it.

As a common question to respondents, we questioned the fact if there was a legal culture in Mexico referred to mediation and arbitration as means of settling disputes. Like other questions, the answer was almost the same with shades of variation. In short, respondents answered: (i) there is no overall legal culture referred to mediation and arbitration, (ii) there are legal provisions that foresee the use of these mechanisms, but they are not applicable in the usual manner; (iii) few Mexican attorneys really know the topic of ADR and its situation in Mexico.

**CRGV. diría que en México hace falta una cultura legal sobre mediación y arbitraje,**

*JARM. Si, definitivamente...!!*

*GRYR ¡¡Yo estimo que todavía la utilización es reducida!! y en el sector público ni que decir, es muy limitada la utilización de estos medios precisamente por la falta de cultura legal.*

Our view is that we are still in a transitional stage in Mexico between the non use of ADR, to a slightly use but more promising every day. In other words, before the conclusion of the NAFTA we could not speak of an ADR legal culture in Mexico. After this treaty and after the necessary legislative changes, it has been appearing in Mexico a legal culture in the use of ADR. It has been a very important and significant change, though we cannot speak to be on the same levels of countries like Britain or the United States yet, where the issue of ADR is an issue in every law firms, every university and even amongst people who do not belong to the legal world. Efforts are being made in Mexico in both, universities and the creation of new arbitral institutions. These efforts have significantly helped and supported this transition. In this regard, we mention the point of view of one of our interviewees.



*JARM. “sí vemos el tema de mediación desde la cuestión académica que hay varias universidades que tienen programas de mediación ... que hacen mediaciones para los poderes judiciales de sus estados es una actividad que se está desarrollando, que se está dando inclusive desde hace mas de 10 años que el estado de Quintana Roo y ... el estado de Jalisco!! fueron los estados pioneros en tener sus leyes de, vamos a llamarle de manera ingeniería de métodos alternativos de resolución de controversia cosa que si lo vemos a nivel internacional pues es una forma de impulsar la mediación privada, es a través de la medición, pongámoslo entre comillas es la mediación judicial.”*

Why has this transition been very slow? Well, possibly for a fear of change. Everyone has a comfort zone, and politicians, legislators and lawyers, as human beings, have their comfort zone too. They have a resistance to change, they think that if things work out in the traditional way, even badly, there is no need for a change. As the Mexican saying that goes “It is better something bad but known, than good but unknown”<sup>844</sup>. We are experiencing a political process of change that has not ended yet. Oil or energy in general, was a negotiating factor in the Mexican Revolution, it was a factor to generate a schema based on what was experienced during, before and after the revolution, and we still live in a comfort zone to be broken. We have taboos to break!!.

The more time passes, the more notable is the need for a better preparation of lawyers in government agencies, however, they still have the resistance to change, they still have the litigation training, litigation education and litigation formality and the rigor for dispute resolution, but somehow some of them are breaking this. Rome was not built in a day, the arbitration change, as we are living, is still in that training stage for lawyers.

As for mediation, we cannot yet speak of tangible results, because its use is practically nil. Following the testimony of two interviewees as for the little use of mediation in Mexico.

*JARM. “me invitaron de un poder judicial a dar una plática de mediación, si la memoria no me falla eso fue en 1996-97, o sea ya hace tiempo no, entonces me acuerdo de la cara de los jueces porque era para jueces y que les empecé a hablar de negociación, y que les empecé a hablar de mediación como métodos alternativos al litigio y la cara que ponían algunos de ellos era, así como ¿¿¿qué es eso???, o qué??? Ahora sí que voy a usar la expresión coloquial a te cae!!! ... es igual que la reforma petrolera,... si vuelvo a la mediación, yo creo que, que como abogados nos falta más, no o sea en el arbitraje. ...”*

*SFG. “¡¡Sí, sí, yo he sido mediador designado digamos por varias instituciones de arbitraje y mediación!! y claro que hemos ayudado a clientes a evitar litigios definitivamente a través de la mediación u otro medios alternativos, no necesariamente arbitraje ¡claro!! si no previos al arbitraje.”*

**CRGV. “Un poquito, como socio de un despacho internacional ¿como ve el tema de la mediación en México, tenemos cultura legal como mexicanos, abogados mexicanos para mediar o todavía no, comparado con otros países?”**

<sup>844</sup> In Spanish this saying would say: “más vale malo por conocido que bueno por conocer”.

*SFG. “¡¡No, definitivamente todavía no!! o sea creo que cuando en México se busca mediar es porque el acceso a ¡¡la justicia en México tiene digamos unos niveles muy decepcionantes, es triste que en México sea así!! la gente cuando tiene necesidad de acudir a los tribunales sea tan difícil hacerlo que termine prefiriendo o no reclamar o aceptar digamos un ofrecimiento muy menor a lo que en realidad tenía derecho.*

*Ese incentivo es perverso y digamos eso es lo que, porque en México se puede llegar a negociar porque sabes el costo de acceder a la justicia, creo que México tiene esos dos problemas, un muy mal sistema de justicia y por otra parte no hay una cultura real de mediación.”*

As part of this transition, we have to consider that there are arbitral institutions already, that bar associations have committees of mediation and arbitration, that mediation and arbitration conferences are held; so, there is an attempt to create an ADR legal culture in general. In the universities, there are courses in ADR, and the largest university in Mexico (UNAM) has already a mediation centre. The University of Nuevo Leon has a graduate course, a master's degree in alternative methods of dispute resolution. In short, there are indeed some attempts, we are not in diapers!! In other words, we already passed from diapers to crawl!! When talking to a lawyer, he/she does not longer attack arbitration, arguing it does not exist, or it does not work, or even it is unconstitutional. Many lawyers have participated to some extent in an arbitration procedure.

There is already a new generation of lawyers who have inherited from what has become the first generation of lawyers dedicated to arbitration, as one respondent said.

*SFG. ¡¡No pues definitivamente todavía estamos en pañales Carlos!! especialmente, en México curiosamente se da una mezcla interesante, hay muy buenos árbitros, hay gente, abogados postulantes muy capacitados en arbitraje digamos que han liderado arbitrajes no solo en México si no en extranjero, son reconocidos internacionalmente y eso viene de tiempo atrás no es algo que se haya desarrollado últimamente, de hecho ¡¡yo soy, me puedo considerar un heredero de gente que atrás de nosotros pico piedra hace mucho años, para poner a México en buen nivel a nivel mundial, como reconocido de que es una fuente de buenos y conocedores árbitros y postulantes de arbitraje!!*

*Sin embargo habiendo dicho eso, es curioso que en México está muy focalizado para empezar en la Ciudad de México esa práctica, es difícil Ok si lo hay pero es difícil encontrar tanta gente que realmente conozca inclusive los casos fuera de la Ciudad de México hay sus excepciones pero es difícil hacerlos realmente está, primero es centralizado en la Ciudad de México, segundo, no se ha llevado el arbitraje al nivel de popularizarlo como ha ocurrido en otros lugares, otros lugares que inclusive su ley arbitral es digamos en términos relativos mas mala que la nuestra, sin embargo la cultura del arbitraje se ha difundido mejor y hay mucho más arbitraje. En Colombia es increíble como su Cámara de Comercio en Bogotá administra tantos y tantos arbitrajes y procesos de mediación.”*

## **5.18. ADR Legal Culture in PEMEX. (Does it Really Exist?)**

Referring specifically to the Mexican Oil & Gas sector, and starting also as in the preceding point, with the issue of the applicable law, we have that the Electric Power Public Service Law in its Article 45 established the possibility that the Electricity Federal Commission and then also the Central Light and Power Company<sup>845</sup> could resolve their disputes not only through the courts of the federation, but also they were allowed to agree the application of foreign law and of arbitration agreements.

This amendment to the Electric Power Public Service Law was copied or implemented also for other laws, such as the Organic Law of Petróleos Mexicanos and Its Subsidiary Bodies and now replaced by the Law of Petróleos Mexicanos, which also recognizes the right of having the recourse of arbitration agreements.

This means that from 1992, the door is open for the Mexican oil sector to use arbitration procedure as an alternative means of dispute resolution. However, it has not been used regularly because, as it has been concluded from the interviews conducted in this research, it has been the custom or habit of solving problems that arise from any contract where Petróleos Mexicanos and all its subsidiary bodies is part, through the courts.

Thus, we can say that the history of ADR in Mexico is divided into “before and after” of 1992. Before that date there was no ADR legal culture at all, and from that date as a result of legislative changes in this area, there has been a growth though “very slow” of the legal ADR culture in Mexico and in the Mexican oil sector.

Now, why does the Mexican oil sector continue to use, in a leading way, the state courts to resolve disputes instead of using ADR that have universal acceptance and have shown great benefits to the parties? Or in other words, answering the initial question in this research: is there really a legal culture of ADR in PEMEX? We believe that this question, at this point has already been answered in many ways.

Corroborating what has been said above, in the sense that mediation is a mechanism not used in PEMEX, next there is a statement of a PEMEX official who somehow explains why ADR is not used PEMEX, being predominantly used the courts to resolve disputes:

*JGGF. “Yo creo que se debe a dos fenómenos principalmente:*

*Primero al desconocimiento por parte de los litigantes de que existe la posibilidad de acudir al arbitraje en lugar de acudir directamente con los tribunales.*

*En segundo lugar considero que de conformidad con nuestro derecho positivo mexicano, la posibilidad que está al alcance de los litigantes, de los abogados, es la*

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<sup>845</sup> Luz y Fuerza del Centro (LyFC) was a decentralized public body, with legal personality and own patrimony, which transmitted, distributed and marketed electric power in the central zone of Mexico: all of the Federal District, to 80 municipalities of the State of Mexico, two of Morelos, Puebla two and five of Hidalgo. On 11 October 2009, by presidential decree, its extinction was ordered; with what its administrative liquidation process was begun, as the electric operation began to be operated by the Federal Electricity Commission.

*de acudir directamente a los tribunales quizá por la misma experiencia que ellos a través de su carrera profesional han adquirido y la facilidad de desenvolverse en ese medio habida cuenta que el arbitraje... bueno implica otra serie de factores, que desde la conformación del tribunal arbitral, bueno una serie de requisitos distintos a los que generalmente está acostumbrado un abogado litigante a utilizar, eso yo creo que es básicamente las razones por la cuales se acude con mayor frecuencia al Poder Judicial para resolver las controversias.”*

As a conclusion, we can say that there is not an ADR legal culture in PEMEX or, perhaps, that there is one but very slight and somehow is not the correct one, because as another Mexican saying goes “everyone talks depending on how the fair went for him”<sup>846</sup>. It means that the little experience that PEMEX has had, has not been as positive as one could expect for the recognition of the benefits of arbitration and mediation in that entity. Below, we reproduce some point of views of some respondents in the sense that they recognize that there is neither a ADR legal culture in PEMEX, nor a team culture:

*LJCHG. “No es lo usual, no tenemos la costumbre de... de irnos... ¡¡y esto de los arbitrajes es algo muy reciente, sobre todo en el jurídico!!”*

**CRGV. “¡¡Claro, no hay cultura legal en PEMEX... digamos para esto!!”**

*LJCHG. “¡¡Exacto, no hay cultura legal!!”*

*MYMP. “¡¡No, no hay cultura de equipo!!”*

**CRGV. “Claro, bueno siguiendo a la siguiente pregunta ¿De manera general que opinión tiene del arbitraje como medio alternativo de solución de controversia?”**

*CEDM. En términos generales es muy bueno, es bueno, quizá nos ahorre tiempos y que en cierto sentido pueden ser mas transparentes y bueno en contra partida si podrían ser un poco caros y agota muchos recursos de Petróleos Mexicanos y de PEMEX Exploración y Producción, en el arbitraje si hemos externado algunas quejas que quizá los órganos administradores no tienen un sistema de control de calidad de resoluciones de sus árbitros y sí hemos visto resoluciones bastante dispares en los al menos 9, 5 arbitrajes que he participado de esos 4 que he leído que son de PEMEX Exploración y Producción si se....*

**Eso me interesa mucho, ¿Que tipo de quejas podrían ser?**

*Quejas en cuanto al fondo de la resolución de los árbitros, está bien que la ICC no se meta en el fondo y lo hace bien y eso lo deje al criterio de los árbitros y así nos comprometimos, pero de cierta manera esas actuaciones en cuánto al fondo deben tener cierta sanción o cierta reacción de la ICC para que no se vuelvan a repetir, sobre todo en casos tan delicados como los que lleva PEMEX Exploración y Producción ¡¡Claro!! también algunos órganos administradores tiene por supuesto cierta preferencia por abogados que son parte de la organización, por despachos que*

<sup>846</sup> In Spanish this saying would say “cada quien habla como le va en la feria”

son buenos clientes de la organización y eso también a veces perturba un poco las acciones que toma PEMEX en su defensa o en las resoluciones.

**¡Y ojala también se explore la posibilidad de otros métodos alternos no nada más arbitraje no.... a lo mejor la mediación podría ser...!!**

CEDM. De hecho por ley ya la tenemos que explorar y nos estamos metiendo ya a tratar de incorporar “Dispute Boards” en los contratos **¡ok!!** en los peritajes que siga teniendo vigencia y seguimos con nuestros procedimientos cuasi administrativos o cuasi civiles.

CRS. bueno desde mi punto de vista yo prefiero someterlo a la clausula de leyes mexicanas y de los tribunales mexicanos, que bueno vamos... sí es una empresa mexicana con una actividad en México, con una contraparte que aunque sea extranjera pero está realizando actividades aquí en México pues que un juez.... y que tengas tres instancias para que puedas pasar por esos tres filtros y tener una resolución sobre un caso en una empresa mexicana y actividades en México pues yo creo que es lo más práctico dado que en el medio de mi punto de vista el arbitraje no ha resultado ser **¡no como se vende!!** no como se vende y luego que te encuentras con que el Club este famoso de Toby, donde un día uno te aparece como árbitro, otro te aparece como abogado de parte, otra vez como colitigante y entonces como que se pierde **¡se desvirtúa!!** se desvirtúa y desvirtúa también lo económico porque son abogados muy caros, cuando tienes que pagar los honorarios son carísimos, y luego tienes que pagar los honorarios de la corte internacional y vamos.... Al final del día pues ya no es tan costo-beneficio ni es tan rápido como se pregona..

SFG. “Pues mira me parece que cada vez mas PEMEX está convencido de que primero es que es una realidad internacional que en la medida en que PEMEX continúe teniendo contratos con partes fuera de México, buscando que sus licitaciones internacionales sean concurridas por los mejores licitantes, los mejores potenciales contratistas en la medida esa, sabe PEMEX que tiene que mantener arbitraje en sus contratos, en sus contratos internacionales creo que lo tiene clarísimo, me parece que dentro de PEMEX hay gente que está completamente a favor del arbitraje que ve a PEMEX en una necesidad de desenvolverse realmente como una empresa privada nivel mundial y que cree en que estos métodos de solución de controversias bien llevados, el tema es que hay que saber estructurar la clausula, saber después administrar los proyectos, administrar los proyectos significa resolver las controversias que viene con ellos y creo que están convencidos.”

“Suum cuique tribuere”

## CONCLUSIONS



## CONCLUSIONS

In Chapter I, we mentioned that we were in total agreement with Gregorio Robles, in the sense that the goal of our research was well suited to what he considers what should be the object of sociological research of institutions (in this case the institution of ADR in Oil & Gas in Mexico).<sup>847</sup> He also mentioned four aspects of a legal institution to determine its validity.<sup>848</sup> In this first part of our conclusions we want to make reference to such aspects:

1. The positivity of ADR in Mexico and in PEMEX. We relate this first aspect to the main hypothesis of our research, it means the ADR legal culture of the institution in both: Mexico as a country, and PEMEX.

ADR legal culture is certainly changing in Mexico. The use of arbitration procedures has become more intensive, more professional and more prestigious during the last 20 years. Universities have included the ADR subject into their course lists. Books and articles have been published covering different aspects of ADR, from those documents teaching basic concepts in the field to more specialized papers trying to cover certain specific aspects such as the present one. People know what ADR means, not only arbitration but also mediation. Judges have shown a more “pro-ADR” attitude in the court judgments they have recently issued. Lawyers are becoming little by little more interested in taking diploma courses to improve their knowledge on the field. Companies are more familiar with alternative methods to resolve their disputes.

Inside PEMEX, ADR legal culture has also changed. We are indeed observing a qualitative change and not merely a quantitative one. The change goes from the total disuse of this institution a few decades ago, specifically before the NAFTA, until the beginning of the use and a constant increase of those mechanisms when resolving domestic and international disputes, after the signing of the before mentioned international treaty. The perception has been noted only for arbitration, leaving mediation still out of the game. We believe that mediation will be shortly used in PEMEX, but important efforts are needed.

2. The effectiveness and ineffectiveness of ADR in PEMEX. We tried to find out the use level of ADR in PEMEX. To this respect, we found that ADR in PEMEX are not as effective as it would have been expected. Many obstacles exist at present that prevent the suitable use of ADR in PEMEX. The obstacles that we detected are: diverse levels of corruption in contracting and conflict resolution areas in PEMEX; the participation of some foreign arbitrators who do not know the applicable Mexican legislation; the lack of knowledge of the applicable substantive and adjective legislation, of some of the defense attorneys and others involved; constant

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<sup>847</sup> See *supra* pp. 15.

<sup>848</sup> Robles, Gregorio, *Op.cit.*, footnote No. 5, pp. 82–83, 182–183.

fear to the comptroller to negotiate or to mediate; politicization of the arbitrations which have been used as targets of attack with merely politicians intentions; the subordination of positions that forces to follow the decisions of the office heads, who have been constantly changed in the last years; the lack of training in the ADR field, of both: the legal personnel as well as the technician one; the lack of an specialized area in ADR subject matters within PEMEX; the cultural differences between PEMEX, and the contracting companies; the erroneous decision making during the arbitrations in which PEMEX has participated; and, the personal economic interests of some people who have participated in these procedures.

3. Prediction of the ADR future in PEMEX. The purpose is to know in advance what will happen to the existing institution. The task of predicting is linked to the knowledge of the past and present institutional reality. Our perception is that the institution of ADR in Mexico and specifically in PEMEX has a good perspective. However, next there are some recommendations we believe are necessary to get the goal of using mediation and increasing the use of arbitration inside PEMEX. These recommendations can be used not only for the use of mediation but also for the negotiation process of contracts out of which the disputes may arise, in case one of the parties alleges the other party breached their agreement.
  - (i) Legal Framework. As for the legal framework, and apart from what it is said below considering some conclusions on the development of the legal framework, we recognize that the changes Mexican legislation experienced during the last 20 years, after the signing of the NAFTA, have been a step forward to having a modern and complete legislation in both spheres: the Oil & Gas industry, as well as the ADR industry. As commented by one of our interviewees “we have a Ferrari but we do not know how to drive it”. We have always shared that idea; however, we still recognized that a full review of the legal framework in both fields must be necessary. Regarding the legal framework of PEMEX, not only the recent legal changes must be reviewed, but also other parallel document which form part of such a framework. We refer to the Labour Collective Contract, the Regulation of Workers, the Regulation of Personnel of Confidence, the Manuals of Organization, and the Manuals of Procedures. The review must be aimed more to the adoption of the use of mediation than arbitration.
  - (ii) Transparency. One of the biggest obstacles we realized that prevents the use of ADR in PEMEX, mainly mediation, is corruption. This phenomenon must be attacked with transparency. The transparency must be foreseen from the date the parties are negotiating the agreement object of the future possible dispute, going through the mechanism that will bring the conflict to an end, until the date the final recommendation or the award is voluntarily complied with. When negotiating the resolution of the dispute, the public servants involved, must demonstrate the convenience of reaching an agreement to avoid major losses to PEMEX. The negotiation proposals must be put under the superiors’ approval and also under the Board of Directors’

affirmative vote. Having an acceptance from such administrative body, an acceptance of the most important federal dependencies would exist, since such an administrative body is formed by members of the federal administration, amongst others.

- (iii) Use of new ADR. One of the first conclusions that we reached was that arbitration is the unique ADR that is being used in PEMEX. As mentioned in Chapter II, there is an almost endless list of ADR that could be used in PEMEX. Particularly, we mention the example of the established panels to resolve conflicts during the construction of the Eurotunnel, which, for being a public work of great scale, could serve as an example to the activities carried out or contracted by PEMEX. Ad-hoc mechanisms can be agreed, taking into consideration the characteristics of each case, amongst the options PEMEX could have, we mention: negotiation, conciliation, mediation, mini-trial, summary jury trial, conciliation-arbitration, mediation-arbitration, rent-a-judge, pre-trial conference, neutral evaluation or early neutral evaluation, executive tribunal, ADR court assistance.
- (iv) Training. ADR training within PEMEX is necessary. We believe this training must have the following characteristics:
  - a. Knowledge on the merits and on the procedure. Training must include all the legal knowledge for both: on the merits to be able to carry out a positive defense of the case, as well as on the procedure of the selected ADR. We have concluded that the main conflicts that could be subject to ADR are those related to public works, mainly those related to refineries, pipelines and oil platforms, that are the result of modernization programs that PEMEX has initiated with the aim to get more petroleum within the Mexican territory. The trainees must have sufficient knowledge on public work subjects, as well as the whole legal frame applicable to ADR.
  - b. Action on time. Often, the first approach after a supposed conflict between the parties is the most important to determine the destiny of its solution. In many occasions, when the contractor and PEMEX have their first discord is, indeed, when the work is being developed and we think that it is the precise moment to begin to consider the use of mediation or any other ADR. Nowadays, the situation that PEMEX faces is that when the problem arrives at the legal department of PEMEX, there is not much room for an alternative solution, since the beginning of the conflict was long time ago. Instead of signing so many modifying agreements, the parties should focus on the solution of the arisen conflicts or even on those situations that would lead to a conflict in the future which might be detected by the parties.

- c. Multidisciplinary. Training must combine all the people involved in this kind of conflicts, both technicians and lawyers. These groups must be formed by personnel who have been many years in PEMEX, who can transmit their valuable experience to new generations. It is clear to us that the experience acquired in the arbitrations in which PEMEX has been a part of, has been extremely expensive and with many errors from which new generation can learn from. Lawyers would have to know more technical questions and technicians more legal questions.
  - d. Preventive. Our opinion is that the qualification must have a preventive approach rather than corrective. Our perception was that, at the moment, the legal apparatus in PEMEX is more in charge “to resolve” more than “to prevent”. Lawyers within PEMEX must have more activities addressed to the prevention of conflicts and in any case to their early resolution.
  - e. Programs. There should be programs within PEMEX with the objective to promote ADR and to foment the research in ADR subject matters, as well as to support the drafting and distribution of written information on the subject. Arbitration and mediation courses should be organized and inclusively, not only addressed to the legal department but also to those in charge of the negotiation and contract administration.
4. The functional analysis of ADR in PEMEX. This aspect aims to understand the institution of ADR in PEMEX in connection with the rest of the institutions that compose the system. To this respect, we connect this institution to the institution of the Oil & Gas industry in Mexico. The conclusion would only be what was already mentioned when explaining the concept of the Sociology of Oil. In other words, the evolution of the ADR in PEMEX has been affected to the evolution of the Oil & Gas industry in Mexico and vice versa. Thus, a change in the former is needed to have a change in the latter.

After having expressed our conclusions considering the four aspects that must be considered in order to determine the validity of a legal institution, according to Gregorio Robles, and linked to the last one of such aspects, it means, the functional analysis of ADR in PEMEX, we will now give some further conclusions on the development of the Oil & Gas industry in Mexico, based on the historical influence to our main research topic:

The evolution of the Oil & Gas industry in Mexico.

5. The Petroleum activity has been closely attached to the social and political movements of the country throughout different times, and it has had indeed a vital relevance in its economic evolution. Since the time of the prehispanic cultures,

2000 years ago, the inhabitants took advantage of the natural resource, first with medicinal purposes, later with energy purposes. Then, in the colonial period, the Spaniards did not give it a more practical use than the one given by the natives. It was until the republic was consolidated, when several attempts in Mexico were carried out to make the petroleum industry an income-producing industry, but it was not until Porfirio Díaz that Mexico experienced an economic expansion time without precedents. Foreigners found Mexico so attractive that injected the country considerable amounts of money, mainly those coming from North Americans, England and Canada. Important figures like Percy N. Furber, Edward L. Doheny, Henry Clay Pierce, Weetman D. Pearson and Williams H. Waters risked their lives and fortunes for this new industry.

6. The industry was growing but it faced several problems amongst which we can mention: the lack of transportation, monopolistic questions in the market, geographic and technological factors, the competition with the crude obtained in Texas. Little by little, these problems were overcome and the industry was not only domestic but began an international stage in the Mexican oil market.
7. However, the industry only grew in some parts of the Mexican Republic, as it was the case of Tampico and Veracruz where the first platform refineries were installed. San Luis Potosí was also another profitable state, with its oil deposit called “El Pez”, and, undoubtedly the so called “Faja de Oro” (from Veracruz to Tamaulipas), which was so important that placed Mexico as the second world-wide producer, and the well “Cerro Azul No. 4”, which was one of the most productive oil mantles at world-wide level, were two examples of the golden age of the industry in this country.
8. Subsequent to 1948, new important oil deposits appeared and it began the development of fields in Reynosa, Tamaulipas. The Northeast region was therefore created, where vast reserves of gas and petroleum existed. The following year the same happened in the western region of Tabasco, but the greatest discovery was the called “la Nueva Faja de Oro”, located to the south-east of the Old Gold Strip, becoming the most productive region with a 50% of the new fields in 1953 and 1956.
9. From 1970 a new and ambitious program of development perforations was initiated. A year later, it was found an oil spot that came up from the bottom of the ocean in Sonda de Campeche. The marine field was denominated Chac. Eight years later another oil spot was discovered the name was “Akal”, which was an extension of the Chac Mantle. The production of the Chac well and Akal well would mark the principle of the operation of one of the greatest oil marine deposits of the world: Cantarell. Unfortunately, with the international collapse of the petroleum prices which initiated in 1981 and finally the prices collapsed in 1986, Mexico faced an extremely difficult stage for the industry which got worse, along with the internal economic situation.

10. The evolution of the Mexican Oil & Gas Industry was subject to international events such as the appearance of the automobile, railroad and airplanes, as well as the use of North American and European ships in World War I. This made the industry so profitable that in 1996, PEMEX obtained a production of crude of 1,043 million barrels, being considered that year as “the highest volume in the history of PEMEX”. The annual crude production increased year with year, until reaching in 2005 the number of 1,237 million barrels, standing out the fields of the Cantarell complex.

#### The Mexican Oil & Gas expropriation.

11. Needless to say that the Mexican Oil & Gas expropriation has been one of the most significant events in this country. It marked a before and after line in the history of Mexico. On the eyes of some people was an illegal act that took a profitable industry away from the hands of foreign companies. On the eyes of others, it was a nationalization authority act that was an example of the sovereignty a country with such natural resources should have.
12. For the purposes of this work, we did not have the intention to go deep on the justification or not of a legal expropriation, which in fact we consider it was, but we need to highlight the origin of such an event, which falls in fact into the scope of the present research, it means, an Oil & Gas ADR. The cause of the conflict that led to the expropriation was the rejection to comply with an arbitral award. This outcome was the solution of a conflict arisen for the great discord there was between the workers and the companies they used to work for. The argument was that the labour benefits amongst the workers of different companies were very different. The companies made their determination public to suspend activities and the Junta de Conciliación y Arbitraje (the labour Mexican Court) ordered the return of the workers to their work, and that the companies put their accounting books under the examination of a commission of experts that would determine if they could satisfy the working demands so emphatically rejected.
13. Negotiation was another ADR used in this expropriation conflict. Once the recovery of the expropriation began, the Mexican government had to take care of the payment to the expropriated companies. Thus, in 1940 talks began in New York and Washington with the representatives of Consolidated Oil Corporation, on the one hand and, the Mexican government on the other, represented by the working leader, Eduardo Suárez, the Ambassador Castillo Nájera and Miguel Casasola. The talks, after long negotiation and working time, concluded in the amount of eight million five hundred thousand dollars that the Mexican government had to pay to this company, deciding the payment with petroleum during next five years. The amount that the North American company requested at first was eighteen million dollars. So, it is important to emphasize the use of negotiations, as an alternative dispute resolution method in such an important conflict 70 years ago.



14. Surprisingly for all the foreign companies, Mexico was able to face the situation after the expropriation bringing the industry to a profitable one. The companies considered that Mexico did not have the technical personnel required due to the complex and highly sophisticated operation of the oil industry. This has been a good example on how the concept of sociology of oil applies since the new legislation of the time, it means, the Expropriation Law and Decree forced the country to adapt itself to the situation of having to take care of an industry without being really prepared.

#### The International Influence.

15. Although we can conclude that the internationalization of the Oil & Gas industry, in some extend, was due to the first intervention of foreigners in it and due to the offer/demand law that has regulated every product in the world, the consequences of the expropriation would not have been the same if the international factors had acted in a different way. The reaction of England before the reaction of the United States was very different. The United States, with Roosevelt's policy of "Good Vicinity" and with the rejection of the old habit, to unilaterally impose its determinations to underdeveloped and developing countries, as well as the principle of non-intervention, did not offer unconditional support to businessmen, as they might have thought.
16. London, on the other hand, insisted on the unconstitutionality of the Law of Expropriation and the Decree of Expropriation. The English government took the position to arrange the boycott to Mexican hydrocarbons and its derivatives and doubted the capacity of the Mexican government to cover the oil indemnification. Mexico, in May of 1938, was forced to break relations with that European country.
17. Mexico tried to sell petroleum to France and Holland, but it was seized when arriving at port due to demands of the oil partnerships, who alleged that it was stolen petroleum. Italy built for Mexico, in shipyards of Genoa, three oil ships in exchange for fuel. This is another good example of how the concept of sociology of oil applies, since the international atmosphere led Mexico to react in a specific way, which was also a consequence of the newly applicable legislation.

Our research was not only a socio-legal analysis of the ADR in PEMEX, but it was also a legal analysis of the applicable framework. The idea was to know the applicable law out of which the sociology of law would apply. Therefore, below there are some conclusions of the legal analysis of the Oil & Gas and ADR industries in Mexico:

18. We have seen a "see-saw" on the stances the government has had, first, with the first Petroleum Law promulgated in 1901, it was settled down that the permits, with the right to make explorations within the corresponding zone, could be granted to individuals or private companies. The government granted a great number of oil concessions that covered immense areas, and this brought a fight amongst the concession-holders known as "the Mexican oil war." The revolutionary government

of President Francisco I. Madero issued a decree in order to establish a special tax on the oil production.

19. In 1917, the new Political Constitution of the United States of Mexico determined the direct control of the Nation on all the wealth coming from the subsoil. Mexico, following the wording of article 27 of the Constitution, took the intention ahead to give its natural resources a dynamic function to the service of the Nation. It was clear the national feeling that the Mexican government was setting up.
20. Then in 1938, the government promulgated the law of expropriation approved by the congress. It was definitely the maximum expression of the government intervention in the industry. We saw a radical change moving the industry from private hands, even foreigner hands, to government and nationalist hands. We believe the measure was necessary if the intention was that the country grow and some blood had to run.
21. However, the Oil & Gas industry grew more than the government capacity and legislation needed to be modified again. Thus, with the purpose to boost the optimization of a natural gas policy, considering an abundant, clean, economical, efficient and safe combustible, in 1995 the Mexican Government set out the convenience to carry out a structural legal reform in this industry in order to expand the pipeline infrastructure and to bring about a greater economic development in the country. Therefore, they opened to the private participation the activities of storage, transportation and distribution of natural gas thru pipelines that were reserved, in the past, only to the State via PEMEX, as well as the activities of foreign affairs and the commercialization of this combustible in national territory.
22. Finally, on 28 November 2008, a new legal reform was published on the Federal Official Journal. The proposals aimed to face the new challenges in the Oil and Gas national industry, in regards to the exploration and exploitation of the Oil and Gas resources, LP Gas, transportation, storage and distribution and refining. The petroleum reform approved by the Congress of the Union is, without any doubt, a step forward that will allow to face the new challenges of the national oil and gas industry, as for the exploration and exploitation of oil and gas resources, natural gas, gas LP, transportation, storage and distribution and refining and, in consequence, to improve the economic development for Mexico.
23. It is relevant to mention that the reform is oriented to the following principles: the Nation has the property and domain of the resource; in this matter will not be neither concession nor contracts that violate the constitutional mandate; the use and the exploitation of the resource corresponds only to the Nation, and the State keeps the property and the control over Petróleos Mexicanos, a public non-centralized body of the public federal administration.
24. We identify as the core part of the reform that Petróleos Mexicanos will be strengthened by having a greater management autonomy, transparency in its

administration, a better use of its technological resources and will broaden its operative capacity, in the sense that it will be considered as a public agency with real possibilities to compete with similar worldwide recognized companies. Of parallel way, the attributions of the regulating organs are reinforced and new structures are created or are updated and modified the existing ones, either in gas, petroliferous, basic petrochemical, saving or efficient use of the energy. In addition, the reform included a revision of the energetic traditional policy, to incorporate new programs, strategies, action and projects, that will be to allow the modernization of this sector.

25. The obtained advance is commendable but we considered that it is not sufficient. The time and the implantation of the approved reform, will mark rules to redefine strategies and policies and to raise new reforms and additions, congruent with the requirements that the country requires to be around the development of the energy in the majority of the countries of the orb.

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